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Supreme Court, U.S.
FILED

No. 02 186 AUG 2 - 2002

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IN THE

Supreme Court of the United States

Kenneth A. Evans,
Petitioner

v.

United States of America,
Respondent

Appendix to
Petition For Writ of Certiorari
To The United States Court of Appeals
for the Third Circuit

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APPENDIX A

Ruling on Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3161

(D.C. Civ. No. 01-cv-00457)

SUR PETITION FOR REHEARING

Kenneth A. Evans,
Plaintiff/Appellant

v.

United States of America,
Defendant/Appellee

Present: BECKER, Chief Judge,
SLOVITER, SCIRICA, NYGAARD, ALITO,
ROTH, McKEE, RENDELL, BARRY, AMBRO
And FUENTES, Circuit Judges

The petition for rehearing filed by appellant in the above-titled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having

voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
"<s> A SCIRICA"
Dated: May 6, 2002

APPENDIX B
Petition for Rehearing En Banc

In the United States Court of Appeals
for the Third Circuit

No. 01-3161

Kenneth A. Evans,
Plaintiff/Appellant

v.

United States of America,
Defendant/Appellee

The proceeding involves one or more questions of exceptional importance. This Court should grant the appellant's petition and reverse the Third Circuit Panel's ("panel") decision and further reverse the District Court's ("Nether Court") decision for the following reasons.

1. Jurisdiction / Lack of Liability - The appellant has no liability for income tax, as the appellant has no "taxable income" as defined in the Internal Revenue Code ("IRC") and related regulations.

2. The decision of this Court in United States v. Connor, 898 F.2d 942 (3rd Cir. 1990), upon which the

Nether Court's decision was based, delineates an un-Constitutional Congressional authority to change the definition of words within the Constitution, is therefore void and must be overturned.

1. JURISDICTION / LACK OF LIABILITY - THE APPELLANT HAS NO LIABILITY FOR INCOME TAX AS THE APPELLANT HAS NO "TAXABLE INCOME" AS DEFINED BY THE IRC AND APPLICABLE REGULATIONS.

"It is elementary law that every statute is to be read in the light of the constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach." McCullough v. Com. Of Virginia, 172 U.S. 102 (1898) 26 USC 1 imposes a tax upon "taxable income." "Taxable income" is defined generally as, "gross income minus the deductions allowed by this chapter." 26 USC 63. "Gross income," in turn, is defined generally as, "all income from whatever source derived, including (but not limited to) the following items: (1-15)." 26 USC 61(a).

The statutes passed by Congress are implemented by regulations published in the Code of Federal Regulations ("CFR") by the Secretary of the Treasury. While the Index of the United States Code ("index") is not technically the law, the law does require that a "general index to the entire Code of Federal Regulations shall be separately printed and bound" 44 USC § 1510. The courts have stated that publishing a regulation in the Federal Register "makes it effective against the world," but added that without the "retrieval mechanism provided by an adequate index," individuals might not be able to find the rules which apply to them, so Congress required the index. The purpose for this requirement was to "eliminate secret law," and this Court has stated that "the indexing obligation is a central and essential feature of

this congressional plan," Cervase v. Office of Federal Register, 580 F.2d 1166 (3rd Cir., 1978).

The reason this is important is that the Index of the CFR, under "Income taxes," has an entry that reads "Income from sources inside or outside U.S., determination of sources of income," 26 CFR 1 (1.861-1--1.864-8T)" This is the only entry in the Index relating to income from sources within the United States. The Code of Federal Regulations, including the Index, is the official notification to the public of what the law requires of them.

Regarding "determination of sources of income," and "income from sources inside or outside U.S.," the index refers the reader to 26 CFR § 1.861-1 and following, which are the regulations corresponding to 26 USC 861. These regulations fall under the heading "Determination of sources of income." "Sec. 1.861-1 Income from sources within the United States. (a) Categories of income. Part I (section 861 and following), subchapter N, chapter 1 of the Code, and the regulations thereunder determine the sources of income for purposes of the income tax." 26 CFR § 1.861-1. (emphasis added)

The meaning of this is unmistakable. The "income tax" is imposed upon "income from whatever source derived," and 26 USC 861 and following, and the related regulations, determine what is considered a "source" of income "for purposes of the income tax." The first sentence of the regulations under 26 USC 861 has stated this since 1954, when Section 861 first came into existence. Note that these sections and regulations define "the" sources of income subject to the income tax, meaning there are no others. Inclusio unius est exlusio alterius. Therefore, the meaning of "income from whatever source derived" (the definition of "gross income" in Section 61) is limited by 26 USC 861 and following sections, and the related regulations. The meaning of the phrase "whatever source" depends completely on the meaning of the word "source" as it is used there.

In addition to the fact that 26 USC 861 and following, and related regulations, determine what is considered a "source" of income subject to the income tax, the regulations also repeatedly state that these are also the specific sections to be used to determine "gross income" and "taxable income" from sources within and/or without the United States.

"Rules are prescribed for determination of gross income and taxable income derived from sources within and without the United States, and for the allocation of income derived partly from sources within the United States and partly without the United States or within United States possessions. §§ 1.861-1 through 1.864. (Secs. 861-864; '54 Code.)" Treasury Decision 6258

As shown, 26 USC 861 and following (which make up Part I of Subchapter N of the Code) are entirely relevant to determining what is considered a "source of income" for the purposes of the income tax, and Section 861 in particular deals with income from "sources" within the United States. Clearly this is relevant to a tax on "income from whatever source derived." The sections which are specifically for determining taxable income from sources within the United States are 26 USC § 861(b) and the corresponding regulations found at 26 CFR §1.861-8. The regulations under 26 USC 63, the section defining "taxable income," do not explain how to determine taxable income.

The regulations in 26 CFR §1.861-8 begin by saying that 26 USC 861(b) describes "in general terms" how to determine taxable income from sources within the United States. These same regulations later specify that 26 USC 861 is about items of income derived from "specific sources."

"(ii) Relationship of sections 861, 862, 863(a), and 863(b). Sections 861, 862, 863(a), and 863(b) are the four provisions applicable in determining taxable income from specific sources." 26 CFR § 1.861-8(f)(3)(ii).

In the first paragraph of 26 CFR §1.861-8 and in 26 CFR §1.861-8(a)(4), it is again made clear that the section applies only to income derived from "specific sources." "The rules contained in this section apply in determining taxable income of the taxpayer from specific sources and activities..." 26 CFR § 1.861-8(a).

"...the term 'statutory grouping' means the gross income from a specific source or activity which must first be determined in order to arrive at 'taxable income' from which specific source or activity..." 26 CFR § 1.861-8(a)(4) In 26 CFR § 1.861-8(f)(1) it is again made clear that 26 CFR § 1.861-8, which is the section "for determining taxable income from sources within the United States," is applicable only to income derived from "specific sources."

"...the determination of taxable income of the taxpayer from specific sources or activities and which gives rise to statutory groupings to which this section is applicable include the sections described below..." 26 CFR § 1.861-8(f)(1)

From these sections it is clear that the term "source" as used in 26 USC 61 and 26 USC 861 does not simply mean any activity from which income is derived, but only those specific sources outlined in the related regulations. The definition of "statutory grouping" also refers to "paragraph (f)(1)" as the list of "specific sources."

"[T]he term 'statutory grouping' means the gross income from a specific source or activity which must first be determined in order to arrive at 'taxable income' from which specific source or activity under an operative section. (See paragraph (f)(1) of this section.)" 26 CFR § 1.861-8(a)(4).

The regulations twice identify 26 CFR § 1.861-8(f)(1) as the list of specific sources, which must first be determined in order to arrive at 'taxable income.' *Inclusio unius est exlusio alterius.*

In the instant case, irrespective of whether this Court erroneously considers the compensation received by the appellant, who lives, works and receives said compensation within the several states of the Union, as falling within the general definition of 'income,' or 'gross income,' the appellant's compensation did not arise from any of the sources listed in 26 CFR § 1.861-8(f)(1).

Because the compensation at issue (Govt. Ex. A) was not derived from any of the sources from which taxable income or gross income is determined, for the purposes of the income tax, according to Constitution, federal law and the applicable regulations, the appellant thusly has received nothing that can be considered "taxable income" for the tax year 1999 and nothing upon which 26 USC 1 has imposed a tax. Once again, the appellant has no liability for income tax for the tax year 1999, and is entitled to a full refund as requested in the appellant's original request for refund and Complaint.

The appellant's compensation is exempt from federal income tax by the Constitution itself. Up to this point in the instant case, the appellee, the Nether Court and the panel have attempted to apply the general language of 26 USC 61(a) and 26 USC 63 to the appellant's situation beyond the limitations of the Constitution and in direct conflict with the United States Supreme Court,

> "It is elementary law that every statute is to be read in the light of the constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach." McCullough v. Com. Of Virginia, 172 U.S. 102 (1898).

In obtaining his compensation, the activity in which the appellant engaged does not fall within the regulatory authority of the few and defined powers

possessed by Congress to exercise and is beyond Congressional authority to tax. "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature." License Tax Cases, 72 U.S. 462 (1866)

2. UNITED STATES V. CONNOR, 898 F.2d 942 (3rd Cir. 1990) IS UN-CONSTITUTIONAL AND MUST BE OVERTURNED

There can be no denying that, in the instant case, the decision upon which the Nether Court based its ruling, United States v. Connor, 898 F.2d 942 (3rd Cir. 1990), claims that Congress has defined the term 'income.' Specifically, this Court held, "Congress exercised its power to tax income by defining income as, inter alia, "compensation for services", including fees, commissions, fringe benefits and similar items ...see 26 USC 61(a)." Id. This ruling directly contradicts the United States Supreme Court.

> "... it becomes essential to distinguish between what is and what is not 'income,' and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress can not by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." Eisner v. Macomber, 252 US 189 at 206 (emphasis added).

Furthermore, the appellant has submitted simultaneously with this Petition, a Motion to Supplement the District Court record with a signed admission from an agent of the Internal Revenue Service,

stating that Congress has not defined 'income,' as the term 'income' is not defined within the Internal Revenue Code. This evidence conclusively exposes the fallacious reasoning in Connor.

For this Court to rationalize that Congress can change, in any way, the definition of the commonly understood meaning of words contained within the Constitution, at the time those words were allegedly added to the Constitution, not only opens the proverbial door to unbridled tyranny, but equates to a direct assault on the entire foundation of republican self-government.

ACTIONS REQUESTED BY THE APPELLANT

The appellant hereby moves this Court, to reconsider and reverse the panel's decision in the instant case, to reverse this Court's decision in United States v. Connor, 898 F.2d 942 (3rd Cir. 1990), to reverse the decision of the Nether Court in the instant case and to order the Internal Revenue Service to refund the appellant's $12,322.58, along with interest, fees and penalties, as this Court sees fit. Furthermore, the appellant moves this Court to reverse the panel's decision to impose sanctions in the amount of $4000 upon the appellant, as it has been proven beyond any doubt that the appellant's appeal was not frivolous due to the appellant's complete lack of liability for income tax in the instant case.

<s> Kenneth A. Evans
Dated: April 22, 2002

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3161

Kenneth A. Evans,
Plaintiff/Appellant

v.

United States of America

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 01-cv-00457
(Honorable James McGirr Kelly)

Submitted Pursuant To Third Circuit LAR 34.1(a)
March 15, 2002

Before: SCIRCA, BARRY and COWEN, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to

Third Circuit LAR 34.1(a). On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered June 27, 2001, and the order entered August 6, 2001, be, and the same are hereby affirmed. Costs taxed against the appellant. Damages in the amount of $4,000 are awarded to Appellee as sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure. All of the above in accordance with the opinion of this Court.

ATTEST:
<s> Marcia M. Waldron, Clerk
DATED: March 26, 2002

Certified as a true copy and issued in lieu of a formal mandate on 5.14.02
Teste: <s> Marcia M. Waldron
Clerk, U.S. Court of Appeals for Third Circuit.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

KENNETH A. EVANS,
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant

No. 01-3161

PLAINTIFF'S INFORMAL BRIEF IN SUPPORT OF APPEAL

I. JURISDICTION

This brief is in support of an appeal, filed in the Eastern District of Pennsylvania ("Nether Court") on August 9, 2001 from an Order dated August 6, 2001, denying plaintiff's, Kenneth A. Evans ("plaintiff"), Motion for Reconsideration and an Order, dated June 26, 2001, denying the plaintiff's Motion for Summary Judgment and granting defendant's, United States of America ("defendant"), Motion for Summary Judgment, Civil Docket # 01-457.

II. PROCEDURAL HISTORY

On January 29, 2001, the plaintiff filed a complaint in this proceeding. On February 26, 2001, plaintiff filed a Motion for Summary Judgment. On April 3, 2001, JONATHAN D. CARROL filed an appearance on behalf of the defendant. On April 4, 2001, the defendant filed a Motion for Enlargement of Time and supporting Memorandum. On April 5, 2001, the plaintiff filed an Addendum to plaintiff's Memorandum in support of plaintiff's Motion for Summary Judgment. On April 9, 2001, the plaintiff filed a Motion to Deny or Reverse defendant's Motion for Enlargement of Time. On April 24, 2001, the Nether Court granted the defendant's Motion for Enlargement of Time until April 27, 2001. On April 27, 2001, the defendant filed a Motion for Summary Judgment and supporting brief. On May 2, 2001, the plaintiff filed an Opposition Brief to defendant's Motion for Summary Judgment. On June 26, 2001, the Nether Court issued a Memorandum and Order denying the plaintiff's Motion for Summary Judgment and granting

the defendant's Motion for Summary Judgment. On or about July 2, 2001, the plaintiff filed a Motion for Reconsideration and supporting brief. On or about July 24, 2001, the plaintiff filed an addendum to plaintiff's Motion for Reconsideration and submitted new evidence in support of the plaintiff's claim. On July 25, 2001, the Nether Court issued an Order requiring the plaintiff to serve a copy of the plaintiff's Motion for Reconsideration on Jonnathan D. Carrol, Esq. On July 26, 2001, the defendant filed an Opposition Brief to the Plaintiff's Motion for Reconsideration. On or about July 27, 2001, the plaintiff filed a Certificate of Service declaring service of plaintiff's Motion for Reconsideration, supporting brief and Addendum to plaintiff's Motion for Reconsideration on Jonnathan D. Carrol, Esq. On or about July 30, 2001, the plaintiff filed a Reply to defendant's Opposition Brief to plaintiff's Motion for Reconsideration. On or about August 6, 2001, the Nether Court issued an Order and Memorandum denying plaintiff's Motion for Reconsideration. On or about August 9, 2001, plaintiff filed an appeal to this Court in the Nether Court.

III. STATEMENT OF FACTS

Throughout the tax year of 1999, $9,422.58 was withheld from plaintiff's total compensation of approximately $62,000 (salary and bonus) and sent to the IRS to be applied to any lawful assessment for federal income tax for that year.

Prior to the tax year 1999, the plaintiff engaged in extensive research into the Internal Revenue Code ("IRC"), the application of the IRC by the Internal Revenue Service ("IRS"), as well as the IRC's interpretation by federal courts. The plaintiff's research uncovered the current specific legal definition of the term 'income' and led the plaintiff to a conclusion best summarized by the United States Supreme Court, "Our system of taxation is based upon voluntary assessment

and payment, not upon distraint." "Flora v. United States, 362 U.S. 145.

On April 17, 2000, the plaintiff mailed to the IRS, a refund request (Plaintiff Ex.A), a bond in the amount of $2,900 (Plaintiff Ex. B) and an opinion letter from a tax attorney (Plaintiff Ex. C).

The request asked to have refunded all money being held by the government less any federal taxes for which the plaintiff had been made liable. To this date, no assessment has been made, nor evidence of liability provided. The IRS failed to respond, either by refunding the money or by providing the legal standing for not providing the refund. This action was initiated on January, 29, 2001, in excess of nine months following the date of the original claim for refund.

IV STATEMENT OF RELATED CASES

The plaintiff has not filed a prior appeal in this case. As of the date of filing of this brief, there are no related cases pending in the Nether Court nor in the Court of Appeals.

V. NETHER COURT ERRORS OF FACT AND LAW

In the instant case, the Nether Court made multiple errors of both fact and law, creating a cascade of negative events.

The first error of fact, that the plaintiff had received 'gross income' in excess of the 1999 exemption amount, was a result of the Nether Court's reliance on a previous error of law by this very Court in United States v. Connor, 898 F.2d 942, 943-44 (3rd Cir. 1990). This resulted in several more errors of law – first, that the plaintiff was required to file an income tax return for the same year, second, that the plaintiff is required to provide the government with information that the plaintiff knows to be false. Information, admitted by the defendant,

which could be used against the plaintiff in a criminal trial. Third, that the IRS has the authority to assess a direct tax against the plaintiff's wages. Ultimately, resulting in one final error of fact, by omission - some unknown and undefined liability for federal income taxes exists in the instant case.

The events of this case, the arguments put forth by the defendant and the conclusions of the Nether Court are not unlike the propositions put forth by Frank Brushaber in the landmark 'income tax' case of 1916, Brushaber v. Union Pacific R.R. Co., 240 U.S. 1. In Brushaber, the Supreme Court articulated statements most appropriately repeated here,

> "The various propositions are so intermingled as to cause it to be difficult to classify them. We are of the opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far reaching effect of this erroneous assumption will be made clear by generalizing the many contentions advanced in argument to support it..." Id. at 10, 11 (emphasis added).

In ruling that the plaintiff is required to file an income tax return for 1999 combined with a finding that the plaintiff received 'gross income' in excess of the exemption amount, the Nether Court has created a unique problem in the history of American jurisprudence.

The Nether Court is attempting to compel the plaintiff to provide information, on an income tax return, which the Supreme Court has ruled, "for the purposes of

Fifth Amendment analysis, is the testimony of a 'witness," Garner v. United States, 424 U.S. 648, which the plaintiff knows not to be true or correct – namely that the plaintiff had received 'gross income' in excess of the exemption amount.

In effect, the Nether Court is attempting to use the force of law to compel the plaintiff to commit perjury.

In spite of the facts, that (1) the defendant has made no argument, nor provided and evidence that liability exists; (2), the plaintiff has provided specific IRS documentation (Plaintiff's Ex. D) showing that no assessment has been made and that a refund is due; and (3), while obtaining the evidence submitted as plaintiff's Exhibit D, an IRS employee, Patricia Zouedet, confirmed that no assessment has been made and that a refund is due (see Addendum to plaintiff's Brief in Support of Motion for Reconsideration).

In the instant case, the existence, or lack of liability for federal income tax, related to the plaintiff for the tax year 1999 is a question of fact. Liability either exists or it does not. The defendant has made no argument that liability exists and has, in fact, provided evidence that it does not, by admitting in the United States' brief in Support of Summary Judgment and in Opposition to plaintiff's Motion for Summary Judgment that no assessment has been made.

The most serious error of law was the total absence of judicial review given to the plaintiff's primary argument – that the plaintiff has no liability for federal income tax for 1999, as no assessment had been made in the instant case. This omission appears to be due, both to the defendant's and the Nether Court's misunderstanding and misapplication of 26 U.S.C. §7422 and the 'variance doctrine.'

> "No suit or proceeding shall be maintained in any Court for the recovery of any internal revenue tax alleged to have been erroneously

> or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C. §7422.

The previous statute is quite clear. The defendant's attempted application of the 'variance doctrine' is at best, incorrect, at worst, purposefully deceptive.

The aim of the 'variance doctrine' is to facilitate administrative determination of refund claims and to restrict litigation to issues which the IRS has considered and is prepared to defend in Court. Real Estate-Land Title & Trust Co. v. United States, 309 U.S. 13, 17-18 (1940); Bank of New York v. United States, 526 F.2d 1012, 1019 (3rd Cir. 1975); Scott Paper Co. v. United States, 943 F. Supp. 489, 493 (E.D. Pa. 1996).

This doctrine is not meant as an excuse for the defendant nor for the courts to ignore the facts of a case, but simply to expedite the legal arguments put forth in a claim. Even supposing the argument that no liability exists, as no assessment has been made, was not raised in the original claim for refund, which it clearly was (Plaintiff Ex. A), it would not permit the Court to simply disregard the existence or non-existence of liability, as this fact would not, and has not changed.

It bears repeating that liability either exists or it does not. The defendant has made no argument and offered no evidence to this effect.

In the Brief in Support of defendant's Motion for Summary Judgment and in Opposition to plaintiff's Motion for Summary Judgment, the defendant made the

following statement, "In plaintiff's motion for summary judgment he makes two new arguments. The first is that because the IRS has not assessed him he is not liable for any taxes," therefore erroneously concluding, "...The Court lacks jurisdiction to hear these arguments..." (emphasis added). The most appropriate term in the English language, to describe this statement is a 'lie.'

The plaintiff's original claim for refund detailed, in plain language, the basis for the requested refund, repeated here ad nauseum, "I understand that unless and until an assessment is made, making me liable for a tax, that the money that has been withheld and sent in on my behalf remains in a 'pending' file and cannot be used by the government. Consider this to be an informal claim for refund of all money, held by the government, less any federal taxes for which I have been made liable for, for the tax year 1999" (Plaintiff Ex. A)

The original claim made clear that, by filing a return the plaintiff understood that he would be voluntarily waiving Constitutionally protected rights by providing information, which could ultimately be used against him in a criminal trial. IRS 1040 Instruction Manual, Privacy Act and Paperwork Reduction Act Notice, pg. 53.

The plaintiff's fears have materialized due to the Order by the Nether Court, which now attempts to compel the plaintiff to commit perjury. This is the very essence of the protections the Fifth Amendment was created to protect.

However, it is worth restating here that the plaintiff has NOT invoked the protections provided by the Fifth Amendment. The plaintiff's argument is that such an invocation is not necessary.

The original claim also elucidated that the plaintiff made multiple telephone calls to the IRS toll free hotline, requesting an explanation of how to file an income tax return without voluntarily waiving the plaintiff's Constitutional rights. During one of these calls, an IRS

employee stated that it was, in fact, the plaintiff's choice whether or not to file a return (Plaintiff Ex. A).
Taking into account that the plaintiff's personal research into the IRC indicated that the plaintiff was not required to file a federal income tax return, combined with the professional opinion of a tax attorney indicating the same, an employee of the IRS confirmed this conclusion - that the filing of an income tax return is voluntary.

All credible evidence available to the plaintiff indicated that no filing requirement exists. Absent a filing requirement, the IRC, and more specifically, 26 U.S.C. 6020(b) does not apply to the plaintiff's situation. The Supreme Court is in agreement, "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." Gregory v. Helvering, 293 U.S. 465 at 469.

This Court's finding in United States v. Connor, 898 F.2d 942, 943-44 and the Nether Court's subsequent reliance on Connor, both violate the rule of stare decisis et quieta non movere, as established by the United States Supreme Court.

The plaintiff will not engage in circular debates as to whether the money received by the plaintiff during 1999 was 'wages,' 'salary' or some other term. Suffice to say, that the money received by the plaintiff during 1999 and detailed on the plaintiff's W-2 form (Defendant Ex. A) is in fact, 'compensation for services,' and as such, can correctly be considered as the item enumerated in 26 U.S.C. § 61(a)(1).

Herein, undeniably, lies the problem. The Nether Court's primary ruling, that the plaintiff is required to file an income tax return, is predicated on the fallacious conclusion that the items enumerated in 26 U.S.C. § 61(a)(1-15) are 'income' and as such, subject to direct taxation, which is not subject to apportionment.
In coming to this conclusion, the Nether Court relied on two decisions, United States v. Connor, 898 F.2d 942, 943-

44 (3rd Cir. 1990) and United States v. Rhodes, 921 F. Supp. 261, 265 (M.D. Pa. 1996).

Specifically, the Nether Court held, "Federal Courts have routinely rejected the argument that the United States has no authority to place a direct tax on wages. It is well established that wages are taxable income within the meaning of the Sixteenth Amendment and that the direct tax on wages is not subject to the apportionment requirement according to the plain language of the Amendment. United States v. Connor, 898 F.2d 942, 943-44 (3rd Cir. 1990) (rejecting the argument that wages are not taxable income); United States v. Rhodes, 921 F. Supp. 261, 265 (M.D. Pa. 1996) ("The Sixteenth Amendment was passed specifically to eliminate the need to subject any income tax to the requirement of apportionment.)" Evans v. United States, (CV-01-457 E.D. Pa. 2001).

Note first, that the Nether Court claimed that 'wages' are 'taxable income,' and not that 'wages' are 'income, as was the holding in Connor, nor 'gross income' as was argued by the defendant.

This appears to have been a simple error on the part of the Nether Court. However, 'income,' 'gross income,' and 'taxable income' are three distinct and different legal terms of which, only the latter two are defined by the IRC. Furthermore, although, the Sixteenth Amendment does unequivocally authorize Congress to tax all three, the IRC imposes a tax on only one, 'taxable income.' 26 U.S.C. §1. If the Court is confused, imagine how the average American feels.

This Court's decision in Connor, held specifically, "Congress exercised its power to tax income by defining income as, inter alia, "compensation for services", including fees, commissions, fringe benefits and similar items ... We take this opportunity to reiterate that wages are income within the meaning of the Sixteenth Amendment ... Unless subsequent Supreme Court decisions throw any doubt on this conclusion, we will

view arguments to the contrary as frivolous..." United States v. Connor, 898 F.2d 942, 943-44 (3rd Cir. 1990).

The reasoning stated in Connor, contains three significant flaws. The first two errors are contained in the clause, "...by defining income as, *inter alia*, 'compensation for services, including fees, commissions, fringe benefits and similar items. 26 U.S.C. §61(a)(1)" Id.

Error number one is the declaration that 26 U.S.C. §61(a) defines the term 'income.' It does not. This section of law defines the term 'gross income.' As previously stated, these are two specifically distinct and different legal terms.

This holding is also contrary to settled law. "The general term 'income' is not defined in the Internal Revenue Code," United States v. Ballard, 535 F.2d at 404.

The language of the statute is as follows: "gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or

trust." 26 U.S.C §61(a) (emphasis added)

In Connor, not only did this Court err in stating what was defined ('income' instead of 'gross income'), but the Court also erred by expressing the actual definition. This Court claimed that the items enumerated , inter alia 'compensation for services' are examples of what was actually being defined.' Irrespective of whether this Court meant 'income' or 'gross income,' this is patently untrue.

> "The phrase "including (but not limited to) the following items" has been misinterpreted to be a phrase modifying the word "income" not the word "source" in its sentence. The rules of English composition govern the noun which is modified; these rules are discussed below.
>
> Participles are verbal adjectives which modify nouns. "Including" is a participle. The verb "include" was converted to a participle by adding the suffix 'ing' for the purpose of describing a noun. The use of the word "including" in Section 61(a) creates a participle phrase.
>
> There are two types of participle phrases: restrictive and non-restrictive. The restrictive phrase appears following the noun it modifies without commas. A restrictive phrase is an inextricable part of the sentence because there are no commas. The non-restrictive phrase can be inserted or hooded on to the sentence and is separated by commas. It is parenthetical; it contributes to but does not change the meaning of the basic sentence. The non-restrictive phrase can be eliminated without changing the basic

> sentence; that is the purpose of setting it apart with commas.
>
> In examining the opening sentence of Section 61(a), the preceding noun of the participle phrase –"including (but not limited to) the following items"—is the word "source." Adjectives always modify the noun immediately preceding when the word or phrase is placed with intervening commas. " Why No One is Required to File Tax Returns (pg110-111), Davidson Press, Yorba Linda, Ca. Copyright © 1996, 2000 William T. Conklin.

The items enumerated 26 U.S.C §61(a)(1-15) are examples of a 'source' from which 'income' may or may not be derived. If income is derived from one of the listed sources (or some other source), the recipient would have met the legal definition of having 'gross income.' If no derivation of income occurs, the recipient would have no 'gross income' but still may very well be in possession of a 'source.'

Therefore, the plaintiff could only have received 'gross income,' in 1999, if the plaintiff derived 'income' from some 'source,' and not if the plaintiff had a 'source,' which derived no 'income'.

This understanding of 26 U.S.C §61 is in perfect harmony with the language of the Sixteenth Amendment. The Amendment reads: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Constitution, Amendment XVI.

The word 'incomes' is the object of the preposition 'on.' The word 'source' is the object of the preposition 'from.' In no way can the word 'source' be made the object of the preposition 'on.' The language of the Amendment clearly delegates to Congress the authority

to impose a tax, without apportionment among the several States, and without regard to any census or enumeration, on 'incomes,' and not on 'sources' from which 'income' may or may not be derived.
Thus, the second fatal error in Connor is that this Court claimed 26 U.S.C §61(a) enumerates items (1-15) of 'income' and not examples of 'sources' from which 'income' may or may not be derived.

The first two errors are, however, dwarfed in severity by the third, which is contained in the clause, "Congress exercised its power to tax income by defining income ..." Id.

The ability to define 'income' does not now, nor has it ever existed within the authority of Congress.

Irrefutable and undeniable evidence of this lack of authority and clarification as to why the power does not exist is illustrated most effectively by The United States Supreme Court,

> "...: it becomes essential to distinguish between what is and what is not 'income,' and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress can not by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." Eisner v. Macomber, 252 US 189 at 206. (emphasis added)

The plaintiff is well aware that Eisner held that a stock dividend made to shareholders in their proportionate interests against profits accumulated by the corporation was not income and that Eisner did not specifically discuss wages.

However, the Eisner Court established the rule of *stare decisis et quieta non movere* relating to the definition of 'income' and to the procedure for applying the definition to future cases. The Supreme Court unequivocally held that Congress does not have the authority to define 'income,' and neither Circuit, nor District Courts have the authority to change this.

Such an unlimited power, to both tax 'income' and to define 'income' would result in a legislative body of totalitarian authority and would effectively emaciate our Constitution.

In the tyrant's fantasy described in Connor, Congress could define income as anything it pleased, providing limitless power to fund endless programs for which no Constitutional authority exists; greatly expanding the size and scope of the federal government well beyond the limited scope envisioned by our forefathers and limited by our Constitution.

Thus, it becomes evident, that Connor was decided either per incuriam or malum en se. The plaintiff prays for the former, but fears the latter.

In reaching the doomed decision, this Court cited other cases with similar findings. Coleman v. Commissioner, 791 F.2d 68, 70 (7th Cir. 1986) also held that 'wages' are 'income' for purpose of internal revenue. The Coleman Court, unfortunately, makes the same fatal errors as this Court in Connor, by misinterpreting the definition of 'gross income' and presuming Congress possessed an authority that has never existed.

The Seventh Circuit, in Coleman, not only erred in equating the 'sources' enumerated in the definition of 'gross income,' with 'income,' but also erred in stating upon what the code actually imposes a tax, "The code imposes a tax on all income. See 26 U.S.C. § 61." Coleman v. Commissioner, 791 F.2d at 70. This is undeniably inaccurate.

26 U.S.C. §61 is nothing more than the definition of 'gross income.' This section of law imposes no tax whatsoever. It only defines the broad category inclusive of 'all income.'

Relating to 'income taxes,' the IRC imposes a tax only on what is defined as 'taxable income' in excess of the exemption amount, not all income. See 26 U.S.C. §1.

'Taxable income' is defined as "gross income minus the deductions allowed by this chapter," 26 U.S.C. § 63. 'Gross income' means 'all income from whatever source derived, including but not limited to…' 26 U.S.C. § 61(a)(1-15).

The language 26 U.S.C. §61(a) may or may not have been designed specifically to obfuscate, creating the illusion that 'income' can be defined as (including, but not limited to) the items enumerated one through fifteen. That conclusion is left to posterity, or if this Court is so inclined, per curia. But, the simple fact remains that this illusion has been perpetuated. The ruling in Connor, not only sanctioned this un-Constitutional proposition, but promoted it. The opportunity now presents itself, in the instant case, to correct this grievous error.

As the plaintiff has clearly demonstrated that the decision in United States v. Connor, 898 F.2d 942, 943-44 (3rd Cir. 1990), is fatally flawed, contrary to established law and most severely contrary to the specific and limited powers of the Constitution, creating a significant threat to the liberty of this nation, this Court is compelled to reverse its decision in Connor, rendering it null and void.

Because 'income' can not be defined by Congress, as the Supreme Court has elucidated, the question arises in the instant case, "Has income, in excess of the exemption amount, been derived from the compensation received by the plaintiff for his services?"

For the purposes of deciding this case, that issue is moot. The Nether Court's ruling, that the plaintiff was required to file a return was entirely dependent on faulty case law. Furthermore, the defendant has admitted that

no assessment has been made and the defendant has offered no evidence of liability. As such, judgment should be immediately entered in favor of the plaintiff and the IRS should be ordered to refund the $12,322.58, plus interest, fees and penalties as allowed by law.

However, because the plaintiff is wholly in support of the proposition that government exists to protect the inherent rights of its citizens, the plaintiff does sincerely wish to meet any and all legal tax obligations that may exist.

To determine this, we look once more to the Supreme Court, "... it becomes essential to distinguish between what is and what is not 'income,' and to apply the distinction, as cases arise, according to truth and substance, without regard to form." Eisner v. Macomber, 252 US 189.

Therefore, it is necessary to 'apply the distinction (of what is and what is not 'income') according to truth and substance, without regard to form," Id, in order to apply "the proper definition of the term 'gross income,' Southern Pac. Co. v. Lowe, 247 U.S. 330 at 335 (1918), to the plaintiff's situation. To accomplish this task, the specific and legal definition of the term 'income' is necessary.

In stating here, the currently established definition of the term 'income,' the plaintiff also fulfills this Court's clarification from the Connor holding which read, "Unless subsequent Supreme Court decisions throw any doubt on this conclusion (that wages are income), we will view arguments to the contrary as frivolous..." Id.

Considering that all Supreme Court decisions are subsequent (following in time or order, American Heritage Dictionary, Second Ed.) to Circuit Court decisions, and that the Supreme Court has, in fact, provided a specific definition of the term 'income' which does not include wages. By its own holding, this Court is barred from a finding that the plaintiff's argument is

frivolous or from imposing sanctions for raising the argument.

The genesis of the definition of 'income' began the very year that the Sixteenth Amendment was adopted, with the Supreme Court holding, "'income' may be defined as the gain derived from capital, from labor, or from both combined," Stratton's Independence , Ltd. v. Howbert, 231 U.S. 399 (1913)

The terms 'capital and 'labor' were soon clarified by the Supreme Court, "Whatever difficulty there may be about a precise and scientific definition of 'income,' it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of tax; conveying rather the idea of gain or increase arising from corporate activities. As was said in Stratton's Independence v. Howbert, 231 U.S. 399, 415, 34 S. Sup.Ct. 136: 'Income may be defined as the gain derived from capital, from labor, or from both combined.'" Doyle v. Mitchell Bros. Co., 247 U.S. 179 at 185 (1918).

Capital is the means of production. Labor is the workforce that operates the means of production. Both are still clearly corporate activities, as described in Doyle and a 'gain' derived from that activity would still be nothing more than corporate profit. The use of the term 'labor' has been perverted into meaning the sweat of the brow of the working class. This perversion is a grievous insult not only to the same, but to every American that gave their life to protect the freedoms outlined in and protected by our Constitution.

The current and binding definition of 'income' is as follows: "a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets." Eisner v. Macomber, 252 U.S.189 (1920) (emphasis added).

> "There would seem to be no room to doubt that the word (income) must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act, and that what that meaning is has now become definitely settled by decisions of this Court. In determining the definition of the word 'income' thus arrived at, this Court has consistently refused to enter into the refinements of lexicographers or economists, and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution." Merchant's Loan & Trust Company v. Smietanka, 255 U.S. 509 at 519 (1921), Doyle v. Mitchell Brothers Co., 247 U.S. 179, 185 (emphasis added).

The timeline is clear. The clarification of the definition of the term 'income' and ultimately what the Sixteenth Amendment authorizes Congress to tax, began in 1913, the year the Sixteenth Amendment was adopted and was "definitely settled" by 1921. Id.

An inherent problem in comprehending the obligations created by the IRC, arises from the definition of 'gross income.' 26 U.S.C. § 61. This definition is nothing more than a comprehensive inclusion of all income, from whatever source derived. Therefore, to properly determine what is and what is not 'gross income,' we need only substitute the accepted definition of the term 'income,' which can not be defined by Congress, nor altered by any court save the United States Supreme Court. Eisner v. Macomber, 252 US 189, United States v. Ballard, 535 F.2d at 404.

Therefore, the proper definition of 'gross income' becomes: "..."gross income means all gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets, from whatever source derived, including (but not limited to) the following items: inter alia, compensation for services ..."

The inclusion of the prepositional phrase 'from whatever source derived,' and the non-restrictive participle phrase 'including but not limited to (items 1-15),' in the definition of 'gross income,' may very well be an overreaching legislative attempt to expand the areas from which a 'gain' can be derived; areas which were "definitely settled by decisions of this Court." Merchant's Loan & Trust Company v. Smietanka 255 U.S. 509 at 519 (1921). But upon close scrutiny, the definition becomes clear.

Once again, consider how the average American feels. The following quote serves as a reminder of the purpose of existence of the United States of America (as a government entity) and consequently the existence of this Court.

"It will be of little avail to the people that the laws be made by men of their own choice, if those laws be so voluminous that that can not be read, nor so incoherent that they can not be understood." Federalist Papers #62

Although 'income' can be derived from whatever source, the 'gain' must be derived from capital, labor or both combined. Taking into account 'what it (the Supreme Court) believed to be the commonly understood meaning of the term (income) which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution." Merchant's Loan & Trust Company v. Smietanka, 255 U.S. 509 at 519 (1921), and, "that what that meaning is has become definitely settled by decisions of this Court." Id. It becomes undeniably clear that, in the instant case, none of these

events occurred. The defendant has offered no evidence to the contrary.

Although it has been made clear that the 'gain' described in the definition of 'income' has specific and limited areas from which it can arise, the plaintiff wishes to eliminate any doubt. Should this Court choose to ignore this asseveration and assume that the items enumerated in 26 U.S.C. § 61(a)(1-5) were areas from which a 'gain' could be derived; there is no evidence that even this wild extension has occurred in the instant case.

The defendant's spurious argument, in support of its claim that the plaintiff received 'gross income,' in excess of the exemption amount, is based on the lonely facts that, during 1999, the pharmaceutical company for which the plaintiff provided a service, compensated the plaintiff in excess of $62,000 and withheld from that compensation, an amount greater than the exemption amount ($9,422.58 vs. $7,050, respectively) to be applied to any lawful assessment.

Because the plaintiff has not voluntarily self-assessed (IRS Publication #21, Flora v. United States, 362 U.S. 145 at 176) for the tax year 1999, the monies withheld, along with the subsequent bond sent to the IRS, remain currently, in limbo.

This argument proved nothing more than the plaintiff has received compensation greater than the exemption amount. It in no way demonstrates that a 'gain,' as required by the definition of "income," has been derived from the compensation. Eisner v. Macomber, 252 U.S. 189 at 207.

Subsequently, no 'gross income' was received, resulting in no filing requirement under 26 U.S.C. 6012(a)(1)(A), ultimately the lâck of any IRS assessment authority under 26 U.S.C. 6020(b) and the plaintiff's classification as a "non-taxpayer," for the tax year 1999.

The defendant has made no argument whatsoever, rational or irrational, to illustrate how a 'gain' was derived from the plaintiff's wages. Therefore,

it is unclear whether the defendant maintains that only the amount withheld from the plaintiff's compensation, the entire amount of the plaintiff's compensation or some arbitrary amount between the two, is considered 'gross income.'

However, we need only look once again, to the Supreme Court, "..that portion of the gross proceeds which represents gain or increase acquired after the taking effect of the act must be regarded as 'gross income'; and to this end it must be distinguished from that portion which represents a return of the capital value existing before." Hays v. Gauley Mountain Coal Co., 247 U.S. 189 at 193 (1918).

There is only one way to determine 'gain.' It is necessary to subtract from the 'gross proceeds' the amount of the (x) value existing before. The (x) representing one of the items expressed in the definition of 'income;' namely, 'capital,' 'labor' or 'capital assets.' This can be accomplished by simply subtracting the 'value existing before' from the 'gross proceeds.' In doing so, whatever is left must be regarded as 'gross income.' Id.

'Gross proceeds' - 'value existing before' = 'gain' or 'income'

To make the appropriate calculation, the plaintiff's situation must be examined. The plaintiff has negotiated with the pharmaceutical company for which he provides a service, an amount of compensation mutually agreeable to both parties for the performance of those services. This amount would be the 'gross proceeds.' Each year, the plaintiff meets with a managerial representative of the pharmaceutical company, to discuss the plaintiff's performance and to determine subsequent increases (or decreases) in the amount of compensation as determined by the value of the service provided.

The 'value existing before' of the service provided by the plaintiff to the pharmaceutical company, through negotiation, is the sole determinant of the amount of agreed upon compensation. Both parties must agree to the 'value existing before' and the 'gross proceeds' or compensation, or an agreement for employment ends or never materializes.

The only possible way that 'gain' could be derived from the plaintiff's compensation, would be if the 'value existing before' were less than the actual compensation received by the plaintiff.

Close examination of the plaintiff's situation illustrates that no rational argument can be made to support the derivation of a 'gain' from the plaintiff's compensation. If the amount of compensation ('gross proceeds') were to exceed the 'value existing before' of the service provided to the company, the company would either decrease the compensation, or seek some other individual to provide a service with higher value. If the amount of compensation ('gross proceeds') decreased below the 'value existing before' of the service, the plaintiff would either ask for a raise or seek another company for which to provide the service (according to the defendant's rational, the plaintiff could declare this as a 'loss' on an income tax return, thus resulting in an 'earned income credit,' but I digress).

This is further illustrated by an expanded view the pharmaceutical company's situation. The same pharmaceutical company, for which the plaintiff provides a service, employs approximately one thousand five hundred individuals across the country to promote the exact same products and each has the exact same job description. Yet, not one of these individuals receives exactly the same amount of compensation. What determines this?

There are three variables that determine the amount of compensation a representative receives. First, the negotiated amount of the base salary (or wages, if the

Court prefers) upon commencement of employment; second, tenure with the company and incremental increases (or decreases) in the annual salary based upon personal developmental; and third, bonus based on promoted product performance.

Because the company values each sales representative differently, each receives a different amount of compensation or 'gross proceeds.' In order to ascertain a 'gain,' which is necessary for 'income,' and therefore, 'gross income' to exist, some baseline of 'value existing before' for the services provided, would have to be established for each individual representative. To claim, as this Court did in Connor, that all 'wages' are 'income' means that the entire amount of compensation received by every representative would equate to a 'gain.' This would have to mean that the 'value existing before,' for each individual representative was zero.

To further illustrate the absolute lunacy of this proposition, think once again of the sales force to which the plaintiff belongs. If the 'value existing before' for each sales representative is zero, what would possibly motivate the pharmaceutical company to compensate each sales representative differently, or anything at all, for that matter? Nothing.

This proposition is wholly ludicrous and is contrary to settled law. "We must reject in this case, as we have rejected in cases arising under the Corporation Excise Tax Act of 1909 (Doyle, Collector, v. Mitchell Brothers Co., 247 U.S. 179 , 38 Sup. Ct. 467, 62 L. Ed. --, and Hays, Collector, v. Gauley Mountain Coal Co., 247 U.S. 189 (1918), the broad content on submitted in behalf of the government that all receipts-everything that comes in-are income within the proper definition of the term 'gross income,' and that the entire proceeds of a conversion of capital assets, in whatever form and under whatever circumstances accomplished, should be treated as gross income." Southern Pac. Co. v. Lowe, 247 U.S. 330 at 335 (1918) (emphasis added).

Notice here, the Court makes reference to the proper definition of the term 'gross income.' Id. Every Court is required to apply the 'proper definition of gross income,' which this Court failed to do in Connor. It matters not, in which of the classifications of items enumerated in the Supreme Court's definition of 'income,' the defendant attempts to classify the plaintiff's compensation for services. Whether 'compensation for services' is considered 'capital,' 'labor,' 'both,' or 'capital assets,' the same principle, in determining 'gain,' would apply.

Substituting 'labor' for 'capital assets,' the ruling would read, "We must reject ... the broad content on submitted in behalf of the government that all receipts-everything that comes in-are income within the proper definition of the term 'gross income,' and that the entire proceeds of a conversion of 'labor', in whatever form and under whatever circumstances accomplished, should be treated as gross income."

Compensation for services is self-explanatory. A service is provided and compensation is exchanged for the service. There is no 'gain.'

Ultimately, as no 'income' has been derived from the plaintiff's compensation, the only possible way that 26 U.S.C. §1 would apply to the plaintiff, would be if the plaintiff voluntarily (and erroneously) declared under penalties of perjury that he had received 'gross income' greater than the exemption amount. The plaintiff has no intention of doing this.

How is it possible then, that a 'gain' or 'income' could be derived from 'compensation for services?' Surely, Congress included this term within the definition of 'gross income' for a reason other than to confuse American citizens into self-assessing a tax for which they would not otherwise be liable.

It is, in fact, possible to derive a 'gain' from 'compensation from services' and this is best illustrated by example: A mining company compensates its labor

force to enter a mine and extract the precious metals for which the mine was established. Adding the cost of the mining equipment to the 'compensation for services' paid to the labor force and subtracting both from the 'gross proceeds' received for the sale of the mine's extracts would result in a 'gain' and therefore, income (or a loss, and therefore a deduction.)

This is, in fact, the reasoning stated by the Supreme Court in first establishing a legal definition for the term 'income,' "The very process of mining is, in a sense, equivalent in its results to a manufacturing process. And, however the operation shall be described, the transaction is indubitably 'business' within the fair meaning of the act of 1909; and the gains derived from it are properly and strictly the income from that business; for 'income' may be defined as the gain derived from capital, from labor, or from both combined, and here we have combined operations of capital and labor. Stratton's Independence , Ltd. v. Howbert, 231 U.S. 399 (1913)

Let us now return to the Nether Court's decision as it relates to the instant case. The erroneous conclusion that the United States possesses the authority to place a direct tax, not subject to apportionment, on the plaintiff's wages is moot for the purposes of the instant case. Citing United States v. Rhodes, 921 F. Supp. 261, 265 (M.D. Pa. 1996) ("The Sixteenth Amendment was passed specifically to eliminate the need to subject any income tax to the requirement of apportionment.).

The ruling in Rhodes, (relating to the lack of requirement of apportionment of taxes laid on income) is inapplicable to the instant case, because to date, no attempt has been made, by the IRS, to impose a direct tax on the plaintiff's wages.

The tax imposed by the IRC is on 'taxable income.' 'Taxable income' is ultimately a derivative of 'income.' Because the tax imposed by the IRC is on 'income' and not on the plaintiff or his property (either real or

personal), the tax is clearly an indirect tax and not subject to apportionment.

It should be pointed out that the logic of Rhodes is backwards, in that the Supreme Court has ruled the Sixteenth Amendment simply prohibited income taxes from being placed in the category of direct taxation, Stanton v.Baltic Mining Co., 240 U.S. 103, the fact still remains that taxes on 'income' are not subject to apportionment and the decision in Rhodes is moot in the instant case.

The issue would, however, again become relevant, should the IRS attempt at some time in the future, to make an assessment against the plaintiff's wages, without either apportionment or the plaintiff's consent.
The Sixteenth Amendment makes no reference to either of the two great classes of taxation, direct or indirect. The Amendment only makes reference to taxes laid on 'incomes.'

The United States Supreme Court has ruled unequivocally that the Amendment prohibits taxes on 'income' from being placed in the category of direct taxation. (See Brushaber v. Union Pacific R.R., 240 U.S. 1 at 10,12 and Stanton v. Baltic Mining Co., 240 U.S. 103 at 112,113) This is entirely consistent with the prohibition placed on Congress from defining what is 'income.'

The plaintiff continues to maintain, with support from every decision by the Supreme Court on the subject, as well as the United States Constitution itself, that all direct taxes must be apportioned according to representation.

As the proverbial fog lifts and the undeniable difference between a 'source' and 'income' is elucidated, this becomes a non-issue.

The greatest confusion surrounding the issue of the voluntary or mandatory nature of the filing an income tax return or liability for income tax rests solely on the existence or non-existence of income in each individual's

case. The existence of income rests solely on the definition of income.

Considering that 'income,' is not automatically derived from 'compensation for services,' logic would dictate, that the overwhelming majority of American citizens, making their livings by receiving compensation for services, do not, in fact, derive income from that compensation.

Such is the genesis of the 'voluntary nature' of the personal federal income tax, eloquently elucidated by the Supreme Court, "Our system of taxation is based upon voluntary assessment and payment, not upon distraint." "Flora v. United States, 362 U.S. 145.

VI. ACTIONS REQUESTED BY THE PLAINTIFF

The plaintiff requests that this Court reverse its decision in United States v. Connor, 898 F.2d 942, 943-44 (3rd Cir. 1990) and reverse the decision of the Nether Court in the instant case. Further, the plaintiff requests this Court order the IRS to immediately refund the $12,322.58 currently being held without assessment, along with interest, penalties, fees and costs as allowed by law, so that it may be forwarded to the Red Cross as soon as possible.

<s> Kenneth A. Evans
Dated: September 18, 2001

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

KENNETH A. EVANS

v.

UNITED STATES OF AMERICA

No. 01-3161

APPELLANT'S INFORMAL REPLY
TO BRIEF FOR THE APPELLEE

At this point in the litigation, all of the arguments are clear. There is no denying that a litany of Circuit Court decisions have held that wages are income (detailed ad naseum in the Brief for the Appellee). This appears to be the issue from which all other arguments stem. The majority of these decisions have been handed down within the most recent score of years. This time line is quite telling. Irrespective of the numerous attempts at suppression, the people are learning the truth and the truth will be known.

Each and every one of the aforementioned Circuit Court decisions, declaring that wages are 'income,' is repugnant to the United States Constitution, repugnant to every Supreme Court decision dealing with the subject of what is and what is not "income" and contrary to the concept of a legitimate government in a free society.

The offending decisions either declare simply that wages are income, supported only by previous decisions with no rational argument or they demonstrate their failing by stating their reasoning, as this Court did in U.S. vs. Connor, 898 F.2d at 943, indicating beyond any doubt just how hostile to freedom they are, by claiming that Congress has the ability to define that which it has the authority to tax. A proposition soundly and rightfully rejected by the Supreme Court. Eisner v. Macomber, 252 US 189 at 206 (1920).

Does our Constitution form the rules for our government? Does our government truly exist to protect the inherent rights of Americans, which include life, liberty and the pursuit of happiness or has the federal government become, in the words of our founders, "destructive of these ends?" This case could provide no clearer a litmus test.

Deciding the fate of the greatest nation in the history of the earth is no small task to be sure and the implications truly affect us all. But, each judge on this Court has taken an oath to uphold and defend the Constitution against all enemies, foreign and domestic. The plaintiff prays that those words were not empty expressions and that this Court shows the courage to speak what is undeniably the truth.

"Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? ... If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime. It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be

essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument." Marbury vs. Madison, 5 U.S. 137, 180 (1803) (emphasis added).

The invalid status of repugnant laws applies to all laws, case and legislative, and as such, U.S. vs. Connor, 898 F.2d 942 (1990), and decisions with similar findings that wages are 'income,' are void.

"A wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicity." United States President Thomas Jefferson, First Inaugural Address, March 4, 1801 (emphasis added).

> "Our country has labored under a federal income tax system that is inconsistent with the liberty of a free people. Quite simply, the government of a free people should not tax the labor of its citizens, and it is imperative that the federal tax system not be repugnant to the Constitution and its laws. Most of Congress now agrees." – Congressman Roscoe Bartlett of Maryland, in a letter to Robert Schultz, Chairman of We The People Foundation for Constitutional Education, Inc. October 12, 2001 (emphasis added).
> http://www.bostonteaparty2.org/bartlett/bartlett.html

> "The existing tax information disclosure provisions reflect the fact that Americans are compelled to surrender the constitutional rights guaranteed by the fourth and fifth amendments, which are the right 'to be secure

> in their papers, and effects, against unreasonable searches and seizures,' and the right against self-incrimination. In order to facilitate the effective administration of our tax laws, each American voluntarily surrenders certain rights and assumes the duty of self-investigation, fact finding and reporting." – U.S. Senator Lowell P. Weicher, Jr. from Connecticut, June 20, 1980 during a Senate Committee Hearing on the IRS and criminal enforcement.

The appellant has made clear that he will never voluntarily surrender these rights. Should these rights ultimately be surrendered, it would only be done so by superior physical force. Should this Court render a decision that would authorize physical force requiring the plaintiff to surrender rights guaranteed by the Constitution, such an action would, by its very existence, negate this Court's otherwise legitimate authority.

"Unless the mass retains sufficient control over those entrusted with the powers of their government, these will be perverted to their own oppression, and to the perpetuation of wealth and power in the individuals and their families selected for the trust. Whether our Constitution has hit on the exact degree of control necessary, is yet under experiment." –Thomas Jefferson to M. van der Kemp, 1812.

In deciding the instant case, the following points should be considered very carefully:

1. The United States Supreme Court has ruled that Congress DOES NOT have the authority to define 'income.' Eisner v. Macomber, 252 US 189 at 206 (1920)

2. This Court has ruled that Congress does have and has exercised the authority to define 'income,' and that

definition includes compensation for services, thus wages, U.S. vs. Connor, 898 F.2d 942 (3rd Circuit)(1990). The District Court's ("Nether Court") Order in the instant case is based entirely on this decision.

3. The 8th Circuit has ruled that Congress has NOT defined 'income.' United States v. Ballard, 535 F.2d at 404 (8th Circuit)(1976).

4. The Nether Court has ruled that the appellant was required to file an income tax return for the tax year 1999.

5. The Supreme Court has ruled that our system of taxation is based upon voluntary assessment and payment, not distraint. Flora v. United States, 362 U.S. 145 at 176.

6. Multiple IRS employees have informed the appellant that filing an income tax return is voluntary, even as recent as October 18, 2001. (see Appellants ex. B, ex. E).

7. The Sixteenth Amendment to the United States Constitution does NOT mention either of the two great classes of taxation; neither Direct nor In-direct.

8. The Nether Court has ruled in the instant case that the Sixteenth Amendment authorizes Congress to impose a direct non-apportioned tax on income.

9. The Supreme Court has ruled that the Sixteenth Amendment PROHIBITS Congress from imposing a direct non-apportioned tax on income. Brushaber v. Union Pacific R.R., 240 U.S. 1 at 10,12 and Stanton v. Baltic Mining Co., 240 U.S. 103 at 112,113, Eisner v. Macomber, 252 U.S. 189.

All relevant documents in this case are posted on the internet at www.reasons2vote.com and have already been viewed by thousands of Americans. The appellant's conscience is clear that his arguments in the instant case are genuine, truthful and correct. Let this Court's actions be the same, lest the liberty of future generations be imperiled.

Respectfully submitted,

<s> Kenneth A. Evans
Dated: 10/24/01

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNETH A. EVANS

v.

UNITED STATES OF AMERICA

CIVIL ACTION – No. 01-457

FILED August 3, 2001

MEMORANDUM AND ORDER

J.M. KELLY, J.

Presently before the Court is a Motion for Reconsideration filed by the Plaintiff, Kenneth A. Evans ("Evans"). Evans filed suit in this Court against the Defendant, United States of America ("United States"), alleging that he is entitled to recover a tax refund in the amount of $12,322.58. Both parties filed cross-motions for summary judgment. In Memorandum and Order dated June 26, 2001, the Court granted the United States' Motion for Summary Judgment and denied Evans' Motion for Summary Judgment. Evans now seeks reconsideration of the Court's decision. For the following reasons, Evans' Motion is denied.

I. BACKGROUND

The parties are in general agreement regarding the underlying facts of this case. Evans earned in excess of $62,000 in wages during the 1999 tax year. In 1999, Evans' employer withheld from his salary a total of $9422.58 and forwarded that sum to the Internal Revenue Service ("IRS"). Evans also sent an additional $2,900 to the IRS to be applied his 1999 income taxes. Along with this additional payment, Evans enclosed a letter requesting a refund of all money held by the IRS in payment of his 1999 income taxes. In sum, the letter stated that he was not required to file an income tax return or pay income taxes for a variety of reasons. The IRS did not respond to Evans' requests and did not refund any of his 1999 income taxes.

Proceeding pro se, Evans filed suit in this Court against the United States seeking judgment in the amount of $12,322.58, the amount held by the United States in payment of Evans' 1999 income taxes. The Court denied Evans' Motion for Summary Judgment and granted the United States' Motion for Summary Judgment. Evans

filed a Motion for Reconsideration of that decision, which the Court will now consider.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 59(e) and Local Civil Rule 7.1(g) of the United States District Court for the Eastern District of Pennsylvania allow parties to file motions for reconsideration or amendment of a judgment. Courts should grant these motions sparingly, reserving them for instances when: (1) there has been an intervening change in controlling law; (2) new evidence has become available; or (3) there is a need to prevent manifest injustice or correct a clear error of law or fact. See, e.g., General Instrument Corp. v. Nu-Tek Electronics, 3 F. Supp.2d 602, 606 (E.D. Pa. 1998), aff'd, 197 F.3d 83 (3rd Cir. 1999); Environ Prods., Inc. v. Total Containment, Inc., 951 F. Supp. 57, 62 n.1 (E.D. Pa. 1996). Dissatisfaction with the Court's ruling is not a proper basis for reconsideration. Burger King Corp. v. New England Hood and Duct Cleaning Co., No. 98-3610, 2000 WL 133756 at *2 (E.D. Pa. Feb. 4, 2000).

III. DISCUSSION

Evans' Motion for Reconsideration does not point out any intervening change in the controlling law since the Court's Order of June 26, 2001. The Motion also fails to identify any new relevant evidence that has since become available that would necessitate a reconsideration of the Court's judgment. In addition, Evans does not contend that there was any error of fact. Therefore, the success of Evans' Motion depends on whether the Court committed a clear error of law or if denying the Motion would result in a manifest injustice.

The arguments which Evans sets forth in the Motion for Reconsideration are essentially recycled from this Motion for Summary Judgment. In the instant

Motion, Evans contends: (1) he has no income tax liability for 1999; (2) he is not required to file an income tax return; and (3) the United States does not have the authority to place a direct tax upon his wages because such a tax would be an unconstitutional direct tax that would need to be apportioned. The Court adequately addressed these arguments in its Memorandum and Order of June 26, 2001. Evans has not persuaded the Court that it committed any errors of law. Moreover, there is no evidence that manifest injustice would result if the Motion were denied. Accordingly, the instant Motion for Reconsideration is denied.

<s> James McGirr Kelly, J.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL NO: 01457

KENNETH A. EVANS
Plaintiff

vs.

UNITED STATES OF AMERICA
Defendant

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

I. HISTORY

The Plaintiff filed a claim for a refund with the Internal Revenue Service on April 17, 2000 (Compl Ex. B) for all money held by the United States less any federal income taxes for which the plaintiff had been made liable for the tax year 1999. The IRS failed to respond. To this date, no assessment has been made nor liability established. The plaintiff filed this action on January 29, 2001. On June 26, 2001, this Court denied the plaintiff's Motion for Summary Judgment and granted the defendant's Motion for Summary Judgment. For the reasons listed below, the plaintiff moves this Court to reconsider both the denial of the plaintiff's Motion for Summary Judgment and the grant of the defendant's Motion for Summary Judgment and further to reverse both.

II. ARGUMENT

Under Section III of the Court's Memorandum in Support of the Court's Order (hereinafter referred to as the Court's Memorandum), the Court states in the first paragraph, "Evans advances three arguments in support of his position that he is entitled to an income tax refund. First, Evans claims that no legal authority requires him to pay income taxes on his wages. Second, Evans contends that any requirement that he file an income tax return would violate his rights under the Fifth Amendment to the United States Constitution, which protects against self-incrimination. Finally, Evans argues that the Sixteenth Amendment to the United States Constitution does not grant the United States the authority to place a direct tax upon his wages because such a tax would be an unconstitutional direct tax that would need to be apportioned."

This statement is inaccurate and incomplete. There is one primary argument put forth by the plaintiff which is clearly stated in the plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment: (A) The plaintiff has no income tax liability for the tax year 1999.

This primary argument is made clear by two supporting arguments. First, (B) the plaintiff has made no assessment by voluntarily filing an income tax return, nor can the plaintiff be compelled by the United States to file a return and second; (C) the United States lacks the authority to place a direct non-apportioned tax on the plaintiff's wages.

A. The Plaintiff Has No Income Tax Liability for the Tax Year 1999

The United States Supreme Court and lower federal courts agree with the plaintiff's primary argument that an assessment is necessary to establish liability. "A tax is an exaction by the sovereign, and necessarily the sovereign has an enforceable claim against every one within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation, which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount of tax payable, and assessments of federal estate and income taxes are of this type. Once the tax is assessed, the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives." Bull v. United States, 295 U.S. 247 55 s. Ct. 695.

"The revenue laws are a code or system in regulation of tax assessment and collection. " Long v. Rasmussen, 281 F.236, at 238 (1922). Economy Plumbing and Heating v. U.S., 470 F.2d 585, at 589 (1972). In Botta v. Scanlon, 314 F. 2d 392 (2d Cir. 1963), the Court made it clear that for purposes of Section 7421(a) the assessment was sufficient to cause to plaintiffs to become a taxpayer. Inversely, stated, without a formal assessment on Form 23C, an individual is a non-taxpayer. Federal regulations clarify this even further. 26 C.F.R. Sec. 601.104(c) reads, "Under the law an assessment is prima facie correct for all purposes. Generally, the taxpayer bears the burden of disproving the correctness of an assessment. Upon assessment, the district director is required to effect collection of any amounts which remain due and unpaid."

Clearly, an assessment must first exist prior to the district director's collection efforts.

In Bauer v. Foley, 404 F.2d 1215 (2d Cir. 1968), affd. on rehearing, 406 F.2d 1241 (1969), the Court declared an IRS lien invalid because 26 U.S.C. 6303(a) was not followed. The Court at page 1221 said: "...The statute 6303(a) requires, however, that the assessment notice be given "to each person liable for the unpaid tax, stating that amount and demanding payment thereof." The consequence of such a defect in the notice is that it invalidates the lien subsequently filed.

26 U.S.C. 6203 authorizes the Secretary of the Treasury or his delegate as the responsible person to execute the Form 23C Assessment Certificate. In order to effectuate this statutory mandate, Treasury Regulation 301.6203-1 was duly promulgated. Section 6203 specifies that an assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate. The Treasury Regulations set forth the procedures governing the assessment process as follows:

"The District Director shall appoint one or more assessment officers, and the assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period if applicable, and the amount of the assessment. The amount of the assessment shall in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer." Treasury Regulation 301.6203-1.

These requirements were succinctly stated in Brafman v. U.S., 384 F. 2d 863 (5th Cir. 1967), at 867, "It appears to us that the requirement of the applicable Treasury Regulation – that an assessment officer sign the assessment certificate – is consistent with the literally mechanical procedures for recording of liability. The recordation is to be accomplished through machine operations, but the actual and final assessment step, that step which establishes prima facie case of taxpayer liability (26 C.F.R. 601.104), can be taken only with the approval of a responsible officer of the Internal Revenue Service. (Emphasis added)

In Section IV, Article 1, 3, of the defendant's Brief in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment (hereinafter referred to as defendant's brief), the defendant openly admits that the United States has not assessed the plaintiff. Further, it is clear that the plaintiff has not made a voluntary assessment against himself. These facts are undisputed.

However, the defendant erroneously asserts that this argument was not made in the plaintiff's original claim for refund.

The defendant cites the "Variance Doctrine" in an attempt to convince the Court not to address the issue. This attempt was apparently successful in misleading the Court, as evidenced by the Court's erroneous conclusion under Section III, Article A, 2 of the Court's Memorandum which reads, "A strict application of the variance doctrine would bar Evans from litigating new grounds of recovery. Evans' refund claim to the IRS only explicitly set forth the arguments that he was not required to file a tax return and that any requirement would violate his Fifth Amendment rights."

This conclusion is contrary to the facts of this case. The plaintiff states quite clearly in the original claim for refund, "I understand that unless and until an assessment is made, making me liable for a tax, that the money that has been withheld and sent in on my behalf remains in a 'pending' file and cannot be used by the government." (Compl. Ex.B.) (Emphasis added)

Because it is clear that an assessment is necessary to establish liability and the plaintiff's argument to that effect was made in the original claim for refund, this Court is compelled to address it.

The very fact that the term "assessment" is eerily and entirely absent from the Court's Memorandum is unnervingly peculiar.

B. The Plaintiff Has No Requirement to Make An Assessment By Voluntarily Filing An Income Tax Return

In relation to the Court's conclusion regarding the requirement to make an assessment by filing an income tax return, the Court ignores the argument set forth by the plaintiff. The court states, "According to the plain language of Section 6012, Evans is required to file an income tax return for the 1999 tax year."

IRS Publication #21 states quite clearly, "You must decide whether the law requires you to file a return." According to the IRS' own publication, the plaintiff has

the responsibility to determine whether the law requires the filing of a return. After extensive research, the plaintiff has decided unequivocally that the law does not require the plaintiff to file an income tax return.

The plaintiff bases this decision partly on the language of 26 U.S.C. § 6012 (a)(1)(A) (1994), and the appropriate legal definition of the word, "shall." When considering that according to Black's Law Dictionary, the definition of the word "shall" requires two hundred and one separate words to define it, and Garner's "A Dictionary of Modern Legal Usage," requires several times that amount, it is astonishing that this Court considers the language of 26 U.S.C. 6012 to be "plain." Black's Law Dictionary, Revised 4th ed., pp 1541-1542, defines 'shall' as follows:

> "As used in statutes, contracts or the like, this word is generally imperative or mandatory... In common ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears.... But it may be construed as merely permissive or directory (as equivalent to"may,") to carry out the legislative intention and in cases where no

> right or benefit to anyone depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense... Also, as against the government, it is to be construed as "may," unless a contrary intent is manifest. (Emphasis added)

Barron's Law Dictionary, Fourth Ed., page 473, concurs:

"Often used to denote an obligation or direction to do some act, 170 N.W. 2d 433, 440; however, it is sometimes considered to be permissive where it is necessary to give effect to the intent of the word, and to mean the same as the word, "may," 103 N.W. 2d 245, 254." (Emphasis added)

Garner's, "A Dictionary of Modern Legal Usage," Second Edition, further elaborates on the problems associated with interpreting 'shall' in the imperative tense:

> "Few reforms would improve legal DRAFTING more than if drafters were to begin paying closer attention to the verbs by which they set forth duties, rights, prohibitions and entitlements. In the current state of common-law drafting, these verbs are a horrific muddle-and, what is even more surprising; few drafters even recognize this fact. The primary problem is shall, to which we must immediately turn. (Emphasis added)
>
> This word runs afoul of several basic principles of good drafting. The first is that a word used repeatedly in context is presumed to bear the same meaning throughout. (Shall commonly shifts it's meaning even in midsentence.) The second

principle is strongly allied with the first: when a word takes on too many senses and cannot be confined to one sense in a given document, it becomes useless to the drafter. (Shall has as many as eight senses in drafted documents.) The third principle has been recognized in the literature on legal drafting since the mid-19th century: good drafting generally ought to be in the present tense, not the future. (Shall is commonly used as a future-tense modal verb.) In fact, the selfsame quality in shall-the fact that it is a CHAMELEON-HUED WORD-causes it to violate each of those principles.

How can shall be so slippery, one may ask, when every lawyer knows that it denotes a mandatory action? Well, perhaps every lawyer has heard that it's mandatory, but very few consistently use it in that way. And, as a result, courts in virtually every English-speaking jurisdiction have held-by necessity-that shall means may in some contexts, and vice-versa....

One solution is... the "ABC Rule," so called because, in the late 1980s, it was most strongly advocated by certain Australian, British, and Canadian drafters. The ABC rule holds that legal drafters cannot be trusted to use the word shall under any circumstances. Under this view, lawyers are not educable on the subject of shall, so the only solution is complete abstinence. As a result, the drafter must always choose a more appropriate word: must, may, will, is entitled to, or some other expression.

This view has much to be said for it. American lawyers and judges who try to restrict shall to the sense "has a duty to"

> find it difficult to apply the convention consistently. Indeed, few lawyers have the semantic acuity to identify correct and incorrect shalls even after a few hours of study. That being so, there can hardly be much hope of the profession's using shall consistently.
>
> Small wonder, then, that the ABC rule has fast been gaining ground in the U.S. For example, the federal government's Style Subcommittee - part of the Standing Committee on Rules of Practice and Procedure – a subcommittee that since 1991 has worked on all amendments to the various sets of federal court rules, adopted this approach, disallowing shall, in late 1992."

Considering that the federal government's Standing Committee on Rules of Practice and Procedure has banned the usage of the word "shall," it must certainly be said that the language of 26 U.S.C. 6012 is anything but "plain."

"All the words used in the statute should be given their proper signification and effect." Washington Market Co. v. Hoffman, 101 U.S. 112, 115 , 25 S. L.ed. 782, 783. "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. ...a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant." U. S. v. Lexington Mill & Elevator Co., 232 U.S. 399 at 409 (1914).

The United States Supreme Court is in agreement with the plaintiff's permissive interpretation of the word 'shall' in 26 U.S.C. 6012, "As against the government, the word 'shall,' when used in statutes, is to be construed as

'may,' unless a contrary intention is manifest." Cairo & Fulton R.R. v. Hecht, 95 U.S. 168 (1877)

Because the language of 26 U.S.C. 6012 (a)(1)(A) is not mandatory, the plaintiff simply chooses not to self-assess by voluntarily not filing an income tax return.

The defendant's argument that 26 U.S.C. 6012 requires the plaintiff to make an assessment by requiring the filing of an income tax return is predicated on the belief that the plaintiff has earned "gross income" in excess of the exemption amount for the tax year 1999. This argument was not addressed in the plaintiff's previous filings for two reasons; first, it is irrelevant due to the language of 26 U.S.C. 6012 being permissive and not mandatory, and second, because the plaintiff did not raise the argument in the original claim for refund.

However, because this Court is willing to accept the defendant's argument that the plaintiff had "gross income" in excess of the exemption amount, based on the lack of a response by the plaintiff and without examining the underlying legal definitions and qualifications of "gross income" and "income,". the plaintiff will address the issue.

Federal law defines 'gross income' as, "except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;

(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust."
26 U.S.C. § 61(a).

The word 'source,' as used in 26 U.S.C. § 61(a), is the object of the preposition 'from' creating the prepositional phrase, 'from whatever source derived.' Prepositional phrases are nothing more than modifiers of a noun or subject in the English language. This statute clearly indicates that 'gross income' is made up only of 'income' and not of the 'sources' themselves as listed in the statute.

Accordingly, 'gross income' does not consist of "sources," but only income which may be derived from any source. Therefore, the plaintiff can only have 'gross income' if the plaintiff derives 'income' from some 'source,' and not if the plaintiff has a 'source' which derives no 'income'.

"The general term 'income' is not defined in the Internal Revenue Code," United States v. Ballard, 535 F.2d at 404.

"The definition of 'income' which was applied was adopted from Stratton's Independence v. Howbert, 231 U.S. 399, 416, 417, arising under the Corporation Excise Tax Act of 1909, with the addition that it should include 'profit gained through sale or conversion of capital assets,' there would seem to be no room to doubt that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act, and that what that meaning is has now become definitely settled by decisions of this Court." Merchant's Loan & Trust Company v. Smietanka, 255 U.S. 509 at 519 (1921) (Emphasis added).

"Yet it is plain, we think, that by the true intent and meaning of the act the entire proceeds of a mere conversion of capital assets were not to be treated as income. Whatever difficulty there may be about a precise and scientific definition of 'income,' it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities." Doyle v. Mitchell Bros. Co., 247 U.S. 179 at 184- 185 (1918).

According to the United States Supreme Court, the term "income" is now defined as, "a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets." Eisner v. Macomber, 252 U.S. 189 (1920).

The plaintiff does not deny that his wages exceeded $62,000 in 1999. However, because the plaintiff's wages did not arise from 'corporate activity' and because the plaintiff's labor was exchanged for his wages there was no 'gain' obtained by the plaintiff and ultimately, no 'income' was derived.

"We must reject in this case, as we have rejected in cases arising under the Corporation Excise Tax Act of 1909 (Doyle, Collector, v. Mitchell Brothers Co., 247 U.S. 179 , 38 Sup. Ct. 467, 62 L. Ed. --, and Hays, Collector, v. Gauley Mountain Coal Co., 247 U.S. 189 , 38 Sup. Ct. 470, 62 L. Ed. --, decided May 20, 1918), the broad content on submitted in behalf of the government that all receipts-everything that comes in-are income within the proper definition of the term 'gross income,' and that the entire proceeds of a conversion of capital assets, in whatever form and under whatever circumstances accomplished, should be treated as gross income. Certainly the term 'income' has no broader meaning in the 1913 act than in that of 1909." Southern Pac. Co. v. Lowe, 247 U.S. 330 at 335 (1918).

To assume that wages, in and of themselves, are income is to assume that the labor supplied in obtaining those wages has no inherent value or something less than the total amount of wages received, thus resulting in a net 'gain' through the receipt of said wages. This is absolutely and utterly ridiculous. The defendant is attempting to classify the plaintiff's labor as a 'capital asset' with absolutely no inherent value and the entire amount of the plaintiff's 'wages' as profit from the conversion of that capital asset.

If an individual's labor is to be considered a capital asset, then wages can be considered nothing more than a mere conversion without profit and, as the court held in Doyle, "the entire proceeds of a mere conversion of capital assets were not to be treated as income."

To calculate profit from this conversion, it would be necessary to establish some baseline of value for each individual's labor and then subtract that value from the wages received. Not only is this scenario impossible, it beyond rational comprehension. The defendant's answer to this problem is to simply assume that every individual's labor has absolutely no inherent value and therefore the entire amount of wages received would be considered 'profit,' and fall under the category of 'gross income.'

The United States Supreme Court concurs, "..that portion of the gross proceeds which represents gain or increase acquired after the taking effect of the act must be regarded as 'gross income'; and to this end it must be distinguished from that portion which represents a return of the capital value existing before." Hays v. Gauley Mountain Coal Co., 247 U.S. 189 at 193 (1918).

The plaintiff prays that this Court recognize the absolute absurdity of this proposition.

Because no 'income' was derived from the plaintiff's wages received for the tax year 1999, the plaintiff has no 'gross income' for that year and is therefore not required to file an income tax return under

26 U.S.C. 6012, even if the language of that statute was mandatory, which it clearly is not.

To declare on an income tax return that the plaintiff has received anything other than zero 'gross income' for the tax year 1999, would result in the plaintiff committing perjury.

The Court's Memorandum states on page 9 in Section III (B), "In this case, Evans is making a blanket invocation of his Fifth Amendment privilege in an attempt to convince the Court that any legal authority requiring him to file a tax return is unconstitutional." This is, once again, contrary to the facts of the case. The Plaintiff's Brief in Opposition to the Defendant's Motion for Summary Judgment plainly states, "The plaintiff has never claimed Fifth Amendment privilege. The plaintiff's argument is that there exists no necessity to claim Fifth Amendment privilege."

C. The United States Lacks the Authority to Place a Direct Non-Apportioned Tax The Plaintiff's Wages

"The revenue laws are a code or system in regulation of tax assessment and collection. They relate to taxpayers, and not nontaxpayers. The latter are without their scope. NO PROCEDURE IS PRESCRIBED FOR NONTAXPAYERS, and NO attempt is made to annul any of their rights and remedies in due course of law. With them Congress does not assume to deal, and they are neither of the subject nor of the object of the revenue laws." [Emphasis added.] Long v. Rasmussen, 281 F.236, at 238 (1922). Economy Plumbing and Heating v. U.S., 470 F.2d 585, at 589 (1972).

"The term 'taxpayer' means any person subject to any internal revenue tax." 26 U.S.C. 7701(a)(14). Absent a lawful assessment for the tax year 1999, the plaintiff has no liability, is therefore not subject to any internal revenue tax, does not meet the definition of a 'taxpayer,'

and is ultimately not the subject nor the object of the revenue laws. Id.

This Court states on Page 12 of the Court's Memorandum, "Federal courts have routinely rejected the argument that the United States has no authority to place a direct tax on wages. It is well established that wages are taxable income within the meaning of the Sixteenth Amendment and that the direct tax on wages is not subject to the apportionment requirement according to the plain language of the Amendment."

There are two distinct presumptions made in this statement. One, that the plaintiff's wages are income and two, that the Sixteenth Amendment authorizes a direct tax. The plaintiff has disposed of the former presumption in pages 7 through 13 of the instant brief and will now dispose the latter.

The Supreme Court called the assumption that the Sixteenth Amendment created the authority to assess a direct non-apportioned tax on income "erroneous," Brushaber vs. Union Pacific R.R., 240 U.S. 1 at 11 (1916) and that " taxation on income was in its nature an excise..." Id. at 17. Excises fall under the category of indirect taxation.

Frank Brushaber was the U.S. agent for a group of foreigners who had stock in the Union Pacific Railroad. Under the 16th Amendment, Brushaber and the Union Pacific Railroad were both made withholding agents and were both ordered by the government to deduct, withhold and pay the income tax to the government, on the foreigners' income from the stock. The Court determined that the U.S. government allows foreigners the privilege of earning money in America, therefore; any income that they earn under that extended privilege is taxable income, and the citizen who acts as the foreigner's agent has to withhold and pay the income tax to the federal Government. In this case, the court told Brushaber that he has to pay the tax because he was the withholding agent for these foreigners upon whom the

income tax is imposed. Brushaber was the party putting forth the argument that the tax was a direct non-apportioned tax on income and the Supreme Court correctly dispelled his claim, clarifying that the tax was an indirect excise on foreign income.

> The Supreme Court stated quite clearly, "The contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived forbids the application to such taxes of the rule applied in the Pollock Case by which alone such taxes were removed from the great class of excises, duties, and imposts subject to the rule of uniformity, and were placed under the other or direct class [Pollock was ruled un-Constitutional for this reason.] This must be unless it can be said that although the Constitution, as a result of the Amendment, in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classifications of the Constitution by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution. Indeed, from another point of view, the Amendment demonstrates that no such purpose was intended, and on the contrary shows that it was drawn with the object of maintaining

the limitations of the Constitution and harmonizing their operation." Id. at 18-19.

The Court ruled quite clearly that the Constitutional limitation that all direct taxes be apportioned remains in full force and effect and was, in fact, emphasized by the Sixteenth Amendment not undermined as this Court contends.

In Stanton v. Baltic Mining Co., 240 U.S.103 (1916), the Supreme Court held, "...it was settled that the provisions of the 16th Amendment conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged, and being placed in the category of direct taxation subject to apportionment..."

This Court's Memorandum correctly states, and the plaintiff AGREES that, "Stanton and Brushaber indicate that the Sixteenth Amendment made clear that income taxes, regardless of the source of income, are not subject to an apportionment requirement."

This is because Stanton and Brushaber also specifically prohibit taxes on income from being placed in the category of direct taxation. The United States Supreme Court ruled very clearly that all income taxes must be obtained through indirect taxation and as such, the need for apportionment among the states has been eliminated for taxes laid on income.

Accordingly, every lower court decision, consistent with the presumption that the Sixteenth Amendment authorizes a direct non-apportioned tax, is in direct conflict with multiple decisions of the United States Supreme Court, as well as the Sixteenth Amendment itself and therefore without merit.

For lower courts, including this Court, to purposefully defy these rulings sets a very dangerous course for the liberty of this country. These lower court actions bring immediately to mind the Supreme Court's warnings of "radical and destructive changes to our Constitutional system," Brushaber vs. Union Pacific R.R., 240 U.S. 1 at 12 (1916).

The authority of Congress, to create a direct non-apportioned tax on income, or any other direct non-apportioned tax, simply does not now, nor has it never existed.

Finally, the pertinent federal regulation relating to the computation of taxable income from sources within the United States specifically excludes the plaintiff's wages from the category of 'not exempt:'

26 C.F.R. Sec. 1.861-8T Computation of taxable income from sources within the United States and from other sources and activities (temporary) reads:

> "For purposes of this section, the term exempt income means any income that is, in whole or in part, exempt, excluded, or eliminated for federal income tax purposes. (iii) Income that is not considered tax exempt. The following items are not considered to be exempt, eliminated, or excluded income and, thus, may have expenses, losses, or other deductions allocated and apportioned to them:
>
> (A) In the case of a foreign taxpayer (including a foreign sales corporation (FSC)) computing its effectively connected income, gross income (whether domestic or foreign source) which is not effectively connected to the conduct of a United States trade or business;

(B) In computing the combined taxable income of a DISC or FSC and its related supplier, the gross income of a DISC or a FSC;

(C) For all purposes under subchapter N of the Code, including the computation of combined taxable income of a possessions corporation and its affiliates under section 936(h), the gross income of a possessions corporation for which a credit is allowed under section 936(a); and

(D) Foreign earned income as defined in section 911 and the regulations thereunder (however, the rules of Sec. 1.911-6 do not require the allocation and apportionment of certain deductions, including home mortgage interest, to foreign earned income for purposes of determining the deductions disallowed under section 911(d)(6))."

Clearly, the only items of 'income' that are listed as not exempt are "gross income in the case of a foreign taxpayer which is not effectively connected to the conduct of a United States trade or business," "foreign earned income," "gross income of a DISC or a FSC," and "the gross income of a possessions corporation for which a credit is allowed under section 936(a)." The federal regulations determining 'taxable income' list specifically those 'sources' of income that are 'not exempt,' and that list does not contain the plaintiff's wages.

Since the plaintiff has obtained no income from the four categories of non-exempt sources, it necessarily follows that the plaintiff's wages are, indeed, exempt from federal income tax.

This ultimately leads to the inarguable conclusion that the personal federal income tax is reliant upon a system of voluntary self-assessment. Once again, the United States Supreme Court has previously decided the

plaintiff's assertion. In Flora v. United States, 362 U.S. 145 (1960), the Supreme Court stated quite clearly, "Our system of taxation is based upon voluntary assessment and payment, not upon distraint." (Emphasis added)

This understanding of the law is admitted by the Internal Revenue Service in it's very own Publication # 21 which reads, "Two aspects of the Federal Income Tax system, voluntary compliance with the law and self-assessment of tax make it important for you to understand your rights and responsibilities as a taxpayer. Voluntary compliance places on the taxpayer the responsibility for filing an income tax return. You must decide whether the law requires you to file a return." This publication is typical of the language associated with the entire Internal Revenue Code and exemplifies why so many Americans have come to distrust the government, which was created for their protection. If an individual determines that they are not required to file an income tax return, that individual is then considered a "non-taxpayer." As such, Publication #21 would not even apply to that individual.

In the instant case, the plaintiff has rightfully and legally determined that the law does not require the plaintiff to file a return and the IRS admits that it cannot make that decision for the plaintiff.

Multiple IRS Commissioners and other federal officials have reiterated this:

"Our tax system is based on individual self-assessment and voluntary compliance," Mortimer Caplin, IRS Commissioner, 1975.

"The IRS's primary task is to collect taxes under a voluntary compliance system." Jerome Kurtz, IRS Commissioner, 1980 Internal Revenue Annual Report.

"We have a voluntary compliance system," Fred Goldberg, IRS Commissioner, Nightline with Ted Koppel, April 13, 1990.

"Let me point this out now: Your income tax is 100% voluntary tax, and your liquor tax is 100% enforced tax. Now, this situation is as different as day and night. Consequently, your same rules just will not apply," Mr. Dwight E. Avis, head of the Alcohol and Tobacco Tax Division of the Bureau of Internal Revenue, giving sworn testimony at a hearing of a subcommittee of the House Committee on Ways and Means (1953).

To continue to allow the United States to possess the plaintiff's $12,322.58, absent a lawful assessment, is to violate the plaintiff's rights protecting against being deprived of property without due process.

In the final paragraph of the Court's Memorandum, the Court states, "In summary, this Court rejects all of Evans' arguments concerning his income tax liability for the 1999 tax year."

The rhetorical question that begs to be asked is, "What is the plaintiff's liability for income tax for the tax year 1999?" This Court has made no clarification and the defendant has made no argument, nor provided any evidence that liability exists.

CONCLUSION

In the instant case, the plaintiff is not required by law to self-assess an income tax according to 26 U.S.C. 6012, due to the voluntary nature of the statute, the voluntary nature of the federal income tax as it relates to the plaintiff and the fact that the plaintiff possessed no 'gross income' as defined by federal law. No lawful assessment has been made against the plaintiff for federal income tax, nor is authorized to be made by the defendant, and no voluntary assessment has been, nor will be made by the plaintiff. The plaintiff's liability for

federal income tax for the year 1999 is zero. Based on the above arguments and authorities, the plaintiff's Motion for Reconsideration should be granted and the previous Order in this case should be reversed.

<s> Kenneth A. Evans
Dated: 7/2/01

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNETH A. EVANS

V.

UNITED STATES OF AMERICA

CIVIL ACTION No. – 01-457

FILED JUNE 26, 20001

Presently before the Court are cross-motions for Summary Judgment filed by the Plaintiff, Kenneth A. Evans ("Evans") and the Defendant, United States of America ("United States"). Evans filed suit in this Court alleging that he is entitled to recover from the United States a tax refund of $12,322.58. Evans contends that he overpaid his income taxes for the 1999 tax year. Evans seeks return of his entire 1999 income tax payment because he claims that no legal authority requires him to file an income tax return or pay income taxes. The United

States, through the Internal Revenue Service ("IRS") refused to comply with Evans' request for a full refund. Both parties now seek summary judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56. For the following reasons, the Defendant's Motion for Summary Judgment is granted and the Plaintiff's Motion for Summary Judgment is denied.

I. BACKGROUND

The parties are in general agreement regarding the underlying facts of this case. Because there are no issues of material fact, judgment can be rendered as a matter of law. The facts of this case are as follows.

Evans, a citizen of the United States and resident of Pennsylvania, earned in excess of $62,000.00 in wages during the 1999 tax year. In 1999, Evan's employer withheld from his salary a total of $9,422.58 and forwarded that sum to the IRS. In April of 2000, Evans sent an additional $2,900.00 to the IRS to be applied to his 1999 income taxes. Along with this additional payment, Evans enclosed a letter requesting a refund of all money held by the IRS in payment of his 1999 income taxes.

Evans' letter to the IRS claimed that the filing of an income tax return constituted a voluntary waiver of one's Fifth Amendment right against self-incrimination. Evans claimed he no longer wished to waive his Fifth Amendment right by filing a return. He requested the IRS provide him with instructions on how to file an income tax return without voluntarily waiving his Fifth Amendment right and to provide him with the specific law that required the filing of an income tax return. Also, Evans attached a letter from an attorney that explained the "voluntary nature of filing an income tax return" and made various arguments for the proposition that the United States has no authority to tax the income of individuals. The IRS did not respond to Evans' requests and did not refund any of this 1999 income taxes.

Proceeding pro se, Evans filed suit in this Court against the United States seeking judgment in the amount of $12,322.58, the amount held by the United States in payment of Evans' 1999 income taxes. Both parties filed Motions for Summary Judgment, which this Court will now consider.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56, a court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ.P.56(c). The movant bears the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant fails to meet this burden under Rule 56(c), its motion must be denied. If the movant adequately supports its motion, however, the burden shifts to the nonmoving party to defend the motion. To satisfy this burden, the nonmovant must go beyond the mere pleadings by presenting evidence through affidavits, depositions or admissions on file to show that a genuine issue of fact for trial does exist. Id. at 324; Fed. R. Civ. P. 56(e). An issue is considered genuine when, in light of the nonmovant's burden of proof at trial, the nonmovant produces evidence such that a reasonable jury could return a verdict against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding whether a genuine issue of fact exists, the court is to believe the evidence of the nonmovant, and must draw all reasonable inferences in light most favorable to the nonmovant. Id. at 255. Moreover, a court must not consider the credibility or weight of the evidence presented, even if the quantity of the moving party's evidence far outweighs that of the nonmovant. Big Apple

BMW, Inc. v. BMW of N. AM., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

If the nonmoving party meets this burden, the motion must be denied. If the nonmoving party fails to satisfy its burden, however, the court must enter summary judgment against it on any issue on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322-23.

That the parties file cross-motions for summary judgment under Rule 56(c) does not necessarily make summary judgment appropriate. Reading Tube Corp. v. Employers Ins. Of Wausau, 944 F. Supp. 398, 401 (E.D. Pa. 1996). In such a situation, "each side essentially contends that there are no issues of material fact from the point of view of that party." Bencivenga v. Western Pa. Teamsters, 763 F.2d 574, 576 n.2 (3d Cir. 1985). Because each side therefore bears the burden of establishing that no genuine issue of material fact exists, "the court must consider the motions separately." Id. (citing Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3rd Cir. 1968).

III. DISCUSSION

Evans advances three arguments in support of his position that he is entitled to an income tax refund. First, Evans claims that no legal authority requires him to pay income taxes on his wages. Second, Evans contends that any requirement that he file an income tax return would violate his rights under the Fifth Amendment to the United States Constitution, which protects against self-incrimination. Finally, Evans argues that the Sixteenth Amendment to the United States Constitution does not grant the United States the authority to place a direct tax upon his wages because such a tax would be an

unconstitutional direct tax that would need to be apportioned.

The United States claims that the "variance doctrine" limits the arguments that Evans may litigate before the Court. The United States contends that the Court can only hear Evans' arguments that were set forth in his original refund claim. The Court will now discuss the arguments of the parties.

A. The Variance Doctrine

As a preliminary matter, the United States argues that the Court is barred from hearing some of Evans' arguments concerning his tax liability for 1999. Specifically, the United States contends that the Court may only hear Evans' argument that he is not required to file a tax return. The United States bases its claim on the "variance doctrine," which bars a taxpayer from litigating in the courts a basis for a refund that was not originally identified in the taxpayer's administrative claim. See Real Estate-Land Title & Trust Co. v. United States, 309 U.S. 13, 17-18 (1940); Bank of New York v. United States, 943 F.Supp. 489, 493 (E.D. Pa. 1996). The aim of the doctrine is to facilitate administrative determination of refund claims and to restrict litigation to issues which the IRS has considered and is prepared to defend in court. Id.

A strict application of the variance doctrine would bar Evans from litigating new grounds of recovery. Evans' refund claim to the IRS only explicitly set forth the arguments that he was not required to file a tax return and that any requirement would violate his Fifth Amendment rights. The Court will address Evans' Sixteenth Amendment arguments, however, because they were mentioned in the letter from the attorney that Evans attached to his refund claim. In addition, the Court will give Evans some latitude because he is proceeding pro se and because many of his arguments are related. Moreover, the Court feels that because these types of tax

protest claims have frequently arisen in recent years, a comprehensive discussion of the law surrounding the requirement to file income tax returns is needed.

B. The Requirement to File an Income Tax Return

Evans contends that no legal authority requires him to file a tax return. The law requires, however, that "returns with respect to income taxes under subtitle A shall be made by ... every individual having for the taxable year gross income which equals or exceeds the exemption amount . . . ." 26 U.S.C. § 6012(a)(1)(A) (1994). The language of this statute is not unconstitutionally vague and clearly specifies who is to file tax returns. United States v. Moore, 692 F.2d 95, 96 (10th Cir. 1979). The statute undeniably requires that every individual who earns a threshold level of gross income must file a tax return. See United States v. Pottorf, 769 F.Supp. 1176, 1183 (D. Kan. 1991).

The United States has demonstrated that Evans clearly met the exemption amount by earning wages in excess of $62,000 during the 1999 tax year. Evans has not argued to the contrary. Thus, Evans' argument that he is not required to file an income tax return lacks any merit. According to the plain language of Section 6012, Evans is required to file an income tax return for the 1999 tax year.

C. Evans' Fifth Amendment Objection

Evans argues that any legal authority requiring him to file an income tax return would violate his Fifth Amendment protection against self-incrimination. This contention has been uniformly rejected. The Fifth Amendment states "no person shall be . . . compelled in any criminal case to be a witness against himself . . " U.S. Const. Amend. V. Generally, this Amendment protects individuals from giving compelled self-incriminating testimony.

It is well established that requiring individuals to file federal income tax returns does not violate their Fifth Amendment rights against self-incrimination. See United States v. Sullivan, 274 U.S. 259 (1927). "There is no Fifth Amendment privilege negating one's duty to file a tax return." United States v. Edelson, 604 F.2d 232, 234 (3rd Cir. 1979). Evans' argument is contrary to established law. The requirement to file an income tax return and pay income taxes does not infringe upon Evans' Fifth Amendment rights.

Evans relies on Garner v. United States, 424 U.S. 648 (1976), to support his contention that his Fifth Amendment rights would be violated if he were required to file an income tax return. Evans' reliance on this case is misguided. In Garner, a taxpayer disclosed his occupation as a gambler on his tax return and was prosecuted for crimes related to illegal gambling. The Court recognized an individual's Fifth Amendment privilege to refuse to answer certain questions on a tax return if the objections are specifically made on the tax return and each objection is justified by a fear of self-incrimination. Id. The Garner Court emphasized that their holding did not disturb the holding in Sullivan, that found that the privilege against self-incrimination is not a defense for failing to file a tax return. Id.

In this case, Evans is making a blanket invocation of his Fifth Amendment privilege in an attempt to convince the Court that any legal authority requiring him to file a tax return is unconstitutional. This argument, and Evans' reliance on Garner to support it, is baseless. The Fifth Amendment privilege may be invoked by a taxpayer who refuses to respond to specific questions included in a tax return. An individual who uses the Fifth Amendment in this manner, however, should confine that use to "specific objections to particular questions on the return for which a valid claim of privilege exists." Edelson, 604 F.2d at 234. "The Fifth Amendment may not be used to draw a 'conjurer's circle'

around the duty to file a tax return." Id. In the present case, Evans makes no objections to specific questions on the tax return but claims any authority requiring him to file would violate the Fifth Amendment. This assertion is an over-extension of Garner. The statutory and legal authority requiring Evans to file an income tax return and pay income taxes does not violate his Fifth Amendment rights.

C. The Power to Tax Wages

Evans argues that the Sixteenth Amendment does not grant the United States the authority to place a direct tax upon his wages because such a tax is an unconstitutional direct tax that must be apportioned. Although Evans relies on a number of Supreme Court cases to support his position, he has misinterpreted their meanings. The Sixteenth Amendment eliminated the necessity for apportionment among states of taxes on income. The language of the Amendment is clear and specific: "The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI.

Evans relies upon Eisner v. Macomber, 252 U.S. 189 (19230), as support for his position that a direct tax on wages would violate the requirement of apportionment. To the contrary, Eisner held that only that a stock dividend made to shareholders in their proportionate interests against profits accumulated by the corporation should not be considered income. Id. at 219. The Court found that a tax on such dividends was a tax on capital increase and not income. Id. at 213. Thus, the Court found that the Sixteenth Amendment did not grant the United States the authority to tax, without apportionment, a stock dividend made lawfully and in good faith. Id. at 219. Because the Eisner case only dealt

with the treatment of stock dividends as income, it is inapposite to the instant case.

Evans also argues that Stanton v. Baltic Mining Co., 240 U.S. 103 (1916) declares that the Sixteenth Amendment does not permit the United States to place a direct tax on wages because such a tax would violate the requirement of apportionment. This reading of the Stanton case is erroneous. In fact, the Stanton case did clarify the purpose of the Sixteenth Amendment. The Court simply found that the provisions of the Sixteenth Amendment were not a new grant of power to tax but merely a mechanism to eliminate the apportionment requirement for income taxes, regardless of the source of income. Id. at 112-13.

The position of the Stanton court is clarified in Brushaber v. Union Pac. R.R. Co., 240 U.S. 1 (1916). The Brushaber Court stated that "the authority conferred upon Congress by § 8 of Article I to lay and collect taxes, duties, imposts and excises is exhaustive and embraces every conceivable power of taxation . . . " Id. at 12. "[T]he whole purpose of the [Sixteenth] Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived." Id. at 18. Stanton and Brushaber indicate that the Sixteenth Amendment made clear that income taxes, regardless of the source of the income, are not subject to any apportionment requirement. Thus, Evans' contention that the United States does not have the authority to tax his wages is meritless.

Federal courts have routinely rejected the argument that the United States has no authority to place a direct tax on wages. It is well established that wages are taxable income within the meaning of the Sixteenth Amendment and that the direct tax on wages is not subject to the apportionment requirement according to the plain language of the Amendment. United States v. Connor, 898 F.2d 942, 943-44 (3rd Cir. 1990) (rejecting the

argument that wages are not taxable income); United States v. Rhodes, 921 F.Supp. 261, 265 (M.D. Pa. 1996) ("The Sixteenth Amendment was passed specifically to eliminate the need to subject any income tax to the requirement of apportionment."). It is quite clear that Evans' argument that the United States has no authority to place a direct tax on his wages is contrary to settled law and therefore without merit.

In summary, this Court rejects all of Evans' arguments concerning his income tax liability for the 1999 tax year. Federal Law requires Evans file an income tax return and pay income taxes, and these requirements are not unconstitutional. Accordingly, the Court will enter summary judgment against Evans and in favor of the United States.

<s> James McGirr Kelly, J.

APPENDIX I

Applicable Statutes and Regulations as per Supreme Court Rule 14.1(f)

26 USC 861(a) states, "The following items of gross income shall be treated as income from sources within the United States:

(1) Interest
(2) Dividends
(3) Personal services
(4) Rentals and royalties
(5) Disposition of United States real property interest
(6) Sale or exchange of inventory property
(7) Amounts received as underwriting income (as defined in section 832(b)(3)) derived from the

issuing (or reinsuring) of any insurance or annuity contract –

(8) Social security benefits

26 USC 861(b) states in pertinent part, "From the items of gross income specified in subsection (a) as being income from sources within the United States there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income. The remainder, if any, shall be included in full as taxable income from sources within the United States. In the case of an individual who does not itemize deductions, an amount equal to the standard deduction shall be considered a deduction which cannot definitely be allocated to some item or class of gross income."

Sec. 1.861-1 Income from sources within the United States. (a) Categories of income. Part I (section 861 and following), subchapter N, chapter 1 of the Code, and the regulations thereunder determine the sources of income for purposes of the income tax. These sections explicitly allocate certain important sources of income to the United States or to areas outside the United States, as the case may be; and, with respect to the remaining income (particularly that derived partly from sources within and partly from sources without the United States), authorize the Secretary or his delegate to determine the income derived from sources within the United States, either by rules of separate allocation or by processes or formulas of general apportionment. The statute provides for the following three categories of income: (1) Within the United States. The gross income from sources within the United States, consisting of the items of gross income specified in section 861(a) plus the items of gross income allocated or apportioned to such sources in accordance with section 863(a). See Secs. 1.861-

2 to 1.861-7, inclusive, and Sec. 1.863-1. The taxable income from sources within the United States, in the case of such income, shall be determined by deducting therefrom, in accordance with sections 861(b) and 863(a), the expenses, losses, and other deductions properly apportioned or allocated thereto and a ratable part of any other expenses, losses, or deductions which cannot definitely be allocated to some item or class of gross income. See Secs. 1.861-8 and 1.863-1.

26 CFR 1.861-8(a) states, "In general--(1) Scope. Sections 861(b) and 863(a) state in general terms how to determine taxable income of a taxpayer from sources within the United States after gross income from sources within the United States has been determined. Sections 862(b) and 863(a) state in general terms how to determine taxable income of a taxpayer from sources without the United States after gross income from sources without the United States has been determined. This section provides specific guidance for applying the cited Code sections by prescribing rules for the allocation and apportionment of expenses, losses, and other deductions (referred to collectively in this section as ``deductions'') of the taxpayer. The rules contained in this section apply in determining taxable income of the taxpayer from specific sources and activities under other sections of the Code, referred to in this section as operative sections. See paragraph (f)(1) of this section for a list and description of operative sections. The operative sections include, among others, sections 871(b) and 882 (relating to taxable income of a nonresident alien individual or a foreign corporation which is effectively connected with the conduct of a trade or business in the United States), section 904(a)(1) (as in effect before enactment of the Tax Reform Act of 1976, relating to taxable income from sources within specific foreign countries), and section 904(a)(2) (as in effect before enactment of the Tax Reform Act of 1976, or

section 904(a) after such enactment, relating to taxable income from all sources without the United States).

26 CFR 1.861(f)(1) states in pertinent part, "(f) Miscellaneous matters--(1) Operative sections. The operative sections of the Code which require the determination of taxable income of the taxpayer from specific sources or activities and which give rise to statutory groupings to which this section is applicable include the sections described below.

(i) Overall limitation to the foreign tax credit.

(ii) [Reserved]

(iii) DISC and FSC taxable income.

(iv) Effectively connected taxable income. Nonresident alien individuals and foreign corporations engaged in trade or business within the United States, under sections 871(b)(1) and 882(a)(1), on taxable income which is effectively connected with the conduct of a trade or business within the United States.

(v) Foreign base company income.

(vi) Other operative sections. The rules provided in this section also apply in determining—

(A) The amount of foreign source items of tax preference under section 58(g) determined for purposes of the minimum tax;

(B) The amount of foreign mineral income under section 901(e);

(C) [Reserved]

(D) The amount of foreign oil and gas extraction income and the amount of foreign oil related income under section 907;

(E) The tax base for citizens entitled to the benefits of section 931 and the section 936 tax credit of a domestic

corporation which has an election in effect under section 936;

(F) The exclusion for income from Puerto Rico for residents of Puerto Rico under section 933;

(G) The limitation under section 934 on the maximum reduction in income tax liability incurred to the Virgin Islands;

(H) The income derived from Guam by an individual who is subject to section 935;

(I) The special deduction granted to China Trade Act corporations under section 941;

(J) The amount of certain U.S. source income excluded from the subpart F income of a controlled foreign corporation under section 952(b);

(K) The amount of income from the insurance of U.S. risks under section 953(b)(5);

(L) The international boycott factor and the specifically attributable taxes and income under section 999; and

(M) The taxable income attributable to the operation of an agreement vessel under section 607 of the Merchant Marine Act of 1936, as amended, and the Capital Construction Fund Regulations thereunder (26 CFR, part 3). See 26 CFR 3.2(b)(3).

26 CFR 1.861-8T(d)(2)(ii)(A) states in pertinent part, "For purposes of this section, the term exempt income means any income that is, in whole or in part, exempt, excluded, or eliminated for federal income tax purposes."

26 CFR 1.861-8T(d)(2)(iii) states in pertinent part, "The following items are not considered to be exempt, eliminated, or excluded income and, thus, may have expenses, losses, or other deductions allocated and apportioned to them:

(A) In the case of a foreign taxpayer (including a foreign sales corporation (FSC)) computing its effectively connected income, gross income (whether domestic or foreign source) which is not effectively connected to the conduct of a United States trade or business;

(B) In computing the combined taxable income of a DISC or FSC and its related supplier, the gross income of a DISC or a FSC;

(C) For all purposes under subchapter N of the Code, including the computation of combined taxable income of a possessions corporation and its affiliates under section 936(h), the gross income of a possessions corporation for which a credit is allowed under section 936(a); and

(D) Foreign earned income as defined in section 911 and the regulations thereunder (however, the rules of Sec. 1.911-6 do not require the allocation and apportionment of certain deductions, including home mortgage interest, to foreign earned income for purposes of determining the deductions disallowed under section 911(d)(6)).

APPENDIX J

Referral Report To: (a.) Examination Division

Kenneth Evans
6 Parrish Court
Kennett Square, PA 19348

172-58-6802

Hoechst Marion Roussell, Inc.
East 10236 Marion Park Drive
Kansas City, MO 64137

Period and class of tax: 1040-1999
Last period for which return was filed: 1998
Referral Information: a. Refusal to file or sign return

Additional Information that will assist the receiving office:

The taxpayer has filed suit against the United States in U.S. District Court to recover the amount of Federal Income Tax withheld in the amount of $9,422.58 along with a subsequent payment in the amount of $2,900 for the 1999 tax year.

The case is currently being handled by Attorney John Carroll in the Dept. of Justice (tele. No. (202) 307-6669). Since the taxpayer believes that only Service can prepare a return on behalf of the taxpayer, the Justice attorney is requesting us to get a return prepared pursuant to IRC 6020(b) so that it will enable him to successfully defend the refund claims. The income tax

calculations should be based on the filing status of married filing separately with on exemption and the standard deduction.

Total Income: $73,890.00
Income Tax Withheld Including Payment: $12,322.58
Tax Liabilty: $17,163.00 ----- < ? > [1]
Tax Due: $4,840.50

See attached IRP documents for the 1999 tax year.

Referring Employee's Signature
<s> Michail Stumpo
Post of Duty: Phila, PA
Telephone number: (215) 861-1932
Employee number: 20824
Date: 7/24/2001

Supervisor's Signature
<s> Eugene V. Batdorf
Telephone number (412) 395-5206
Date: 7/24/2001

Form 3449 (Rev. 1-93)
Part 1-Retained by Receiving Office
Department of the Treasury-Internal Revenue Service

[1] - A Question mark was hand written with a line leading to this amount by an IRS employee indicating confusion as to how this figure was calculated.

APPENDIX K

Figure 23-2

Order No. 182 (Rev. 3)

Effective date: 12-14-83 Authority to Execute Returns

The authority granted to the Commissioner of Internal Revenue by 26 CFR 301.6020-1(b) and 26 CFR 301.7701-9 to execute returns required by any internal revenue law or regulation made thereunder when the person required to file such return fails to do so, is delegated to:

1. Revenue agents;
2. Tax auditors;
3. Revenue officers, GS-9 and above;
4. Collection Office function managers, GS-9 and above;
5. Automated Collection Branch Managers, GS-9 and above; and
6. Service Center Collection Branch managers, GS-9 and above.

The authority delegated herein may not be redelegated. Delegation Order No. 182 (Rev. 2), effective March 7, 1983, is superseded.
/s/ James I. Owens
Deputy Commissioner

The IRM restricts the broad delegation shown in figure 23-2, for revenue officers, to employment, excise, and partnership tax returns because of constitutional issues. (You have already studied audit referrals as a means to enforce compliance on income tax returns).

Generally you can file the following returns, using the authority granted by IRC section 6020(b):

1. Form 940, Employer's Annual Federal Unemployment Tax Return
2. Form 941, Employer's Quarterly Federal Tax Return

3. Form 942, Employer's Quarterly Tax Return for Household Employees
4. Form 943, Employer's Annual Tax Return for Agricultural Employees
5. Form 720, Quarterly Federal Excise Tax Return
6. Form 2290, Federal Use Tax Return on Highway Motor Vehicles
7. Form CT-1, Employer's Annual Railroad Retirement Tax Return
8. Form 1065, U.S. Partnership Return of Income.

When you recommend an assessment under IRC 6020(b), you will prepare all the necessary returns for compliance. If a return will be due during the IRC section 6020(b) processing time, prepare it as well.

Respectfully submitted,

Kenneth A. Evans
Dated: